(SHOW)

PROCEEDINGS AND ORDERS

DATE: 0320

CASE NBR 84-1-00690 CFY
SHORT TITLE United States
VERSUS Gagnon, Robert P., et al.

DOCKETED: Oct 29 1984

Date	Proceedings and Orders
Oct 29 1984	Petition for writ of certiorari filed.
Jan 2 1985	DISTRIBUTED. January 18, 1985
Dec 28 1984	Brief of respondent Donald T. Storms in opposition filed.
Jan 8 1985	Reply brief of petitioner United States filed.
Jan 9 1985	LODGING received.
Jan 30 1985	1/25/85 Record requested by WHR.
Jan 30 1985	Record received 1/30/85.
Jan 30 1985	Record filed.
Jan 30 1985	Certified copy of original record & C.A. proceedings. Sealed envelope and one box. recieved.
Feb 1 1985	REDISTRIBUTED. February 15, 1985
Feb 19 1985	REDISTRIBUTED. February 22, 1985
Mar 7 1985	Motion of respondents for leave to file supplement to record filed.
Mar 11 1985	REDISTRIBUTED. March 15, 1985

CONTINUE (

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Date	Proceedings and Orders
Mar 18 1985	Motion of respondents for leave to file supplement to record GRANTED. Justice Powell OUT.
Mar 18 1985	Petition GRANTED. Judgment REVERSED. Dissenting opinion by Justice Brennan with whom Justice Marshall joins. Opinion per curiam. Justice Powell OUT.

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84-690

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT PAUL GAGNON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether respondents' rights to be present at trial under the Constitution or Fed. R. Crim. P. 43 were violated by the trial court's in chambers interview of a juror, in the presence of defense counsel, where respondents neither requested to attend the interview personally nor objected to the proceeding or its outcome.

2. Whether an error of this sort (if it was error) may be presumed to be so prejudicial to the defense that it constitutes reversible error even in the absence of an objection at trial or any concrete demonstration of prejudice.

PARTIES TO THE PROCEEDING

In addition to the parties shown in the caption, Pedro Valenzuela, Donald P. Storms, and Glenn E. Martin were appellants below and are respondents herein.

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OCTOBER TERM, 1984

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT PAUL GAGNON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 721 F.2d 672.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1983. A petition for rehearing was denied on August 29, 1984 (App., *infra*, 16a-17a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Rules 43 and 52 of the Federal Rules of Criminal Procedure are set out at App., *infra*, 23a-24a.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, respondents were convicted on all counts with which they were charged: one count of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and various counts of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841.[1] Respondent Gagnon was sentenced to concurrent five-year terms of imprisonment to be followed by a five-year special parole term. Respondent Valenzuela was sentenced to concurrent 18-month terms of imprisonment to be followed by a three-year special parole term. Respondent Storms was sentenced to concurrent ten-year terms of imprisonment to be followed by concurrent five-year special parole terms; he was also fined $10,000. Respondent Martin was sentenced to a four-year term of imprisonment and fined $2000 on the conspiracy count; the sentences on his two possession convictions were suspended in favor of a five-year term of probation to run consecutively to the terms of incarceration.[2] The court of appeals reversed all convictions. App., *infra*, 1a-15a.

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[1] Of the eight possession counts with which they were variously charged, respondents were convicted as follows: Gagnon on one count (Count 3); Valenzuela on one count (Count 13); Storms on seven counts (Counts 3, 4, 5, 8, 11, 12, and 13); and Martin on two counts (Counts 2 and 3).

[2] Nine others were indicted with respondents. Alvaro Becerra, Timothy Pohlschneider, Gentry Neal, and John Cates pleaded guilty. The charges against Kevin Hynes, David Linquist, and Keith Mors were dismissed on the government's motion, and Hynes and Linquist testified for the government at trial. Donald Tore Jensen and Wes Lundy are fugitives. Jeffrey Tietzer pleaded guilty to a separate indictment and testified for the government at trial.

1. The evidence at trial showed that from October 1979 through October 1980, respondents were part of a large-scale cocaine distribution scheme centered in Tucson, Arizona. In broad outline, the scheme operated as follows: Jeffrey Tietzer, the hub of the conspiracy in Tucson, traveled frequently to Florida, where he obtained cocaine from Alvaro Becerra. He then sold the cocaine through several distributors in Tucson, who in turn had their own customers. Respondents Martin and Gagnon were two of Tietzer's distributors, but as the scheme progressed, respondent Storms became Tietzer's principal distributor.

In October 1979, Tietzer was introduced to Becerra and informed that Becerra could provide large quantities of cocaine (Tr. 84-85). For a down payment of approximately $4500, Becerra provided Tietzer with a half kilo of cocaine (Tr. 86).[3] After he returned to Tucson, Tietzer showed the cocaine to respondent Gagnon. Gagnon examined the cocaine with a microscope and, satisfied with its quality, agreed to find buyers for it. Tr. 87.

Subsequently, Gagnon introduced Tietzer to Donald Tore Jensen.[4] Using a "hot box" (a device for testing the quality of cocaine by determining the tempera-

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[3] One kilo equals 2.2 pounds.

[4] Respondent Gagnon, who claimed an alibi, was the only defendant to testify at trial. Although he denied any narcotics transactions with Tietzer, he admitted that he owned a type of microscope (stereoscope) and that he had introduced Tietzer to Jensen (Tr. 709, 714).

ture at which it melts), Jensen tested the quality of the cocaine and then agreed to sell it. Tr. 89-90. Jensen in turn introduced Tietzer to other buyers, respondent Martin and Wes Lundy. Tietzer supplied Martin and Lundy with cocaine on consignment, and the next day they paid him $14,000 from their sale proceeds. Tr. 91-94. Tietzer gave respondent Gagnon and Jensen each one ounce of cocaine in payment for introducing him to the buyers (Tr. 93).[5]

In November, respondent Gagnon contacted Tietzer and said that he had Phoenix buyers who wanted to buy five kilos of cocaine (Tr. 100, 103, 104-105). Tietzer notified Becerra, who personally delivered three kilos of cocaine to Tucson (Tr. 105-106, 107; CR 212).[6] When Gagnon's buyers did not appear, the conspirators contacted Jensen, who called respondent Martin and Lundy. Martin arrived with $10,000. Tr. 110-111. Then, because Martin and Lundy had sold only a half kilo and the conspirators still had a substantial quantity of cocaine to sell, Jensen contacted respondent Storms. After testing a sample of the cocaine, Storms paid Tietzer, Becerra, and Jensen $29,500 for about a half kilo. Tr. 111-114.[7]

The next day, respondent Storms telephoned to report that he had buyers arriving from Seattle with money to purchase a half kilo of cocaine. Storms, Becerra, and Tietzer met at the Tucson airport. Storms met the buyers' plane and brought them to the airport parking lot, where they paid about $26,000 for a half kilo of cocaine. Tietzer and re-

[5] These events in October 1979 form the basis for Count 2.

[6] "CR" refers to the district court clerk's record of exhibits.

[7] These events form the basis for the charge against respondent Martin in Count 3 and respondent Storms in Count 4.

spondent Storms received six ounces of cocaine as their payment, and Storms sold it for them. Tr. 115-117.[8]

During the next several months, some 10 one-kilo shipments of cocaine were made from Becerra in Florida through Tietzer to respondent Storms for sale. Tietzer delivered Becerra's payments personally or transmitted them by air transport disguised as printed matter. Tr. 117-119, 122, 124-128.

Two more transactions occurred at the end of May 1980. On May 29, Tietzer sold Storms two kilos of cocaine he had brought from Miami. Tr. 151-152. When Storms made partial payment of $105,000 the next day, he told Tietzer he needed three more kilos. Tietzer immediately flew to Florida for the cocaine and returned, accompanied by Becerra. Storms later paid $180,000 for the shipment. Tr. 153-155, 157-158; CR 401-406.[9]

The last two sales occurred in July 1980. Tietzer brought a kilo of cocaine to Tucson, gave it to Storms for sale, and transmitted about $60,000 to Becerra by an air express package service (Tr. 159-161).[10] Shortly afterward, on behalf of Becerra (his brother-in-law) respondent Valenzuela delivered three kilos of cocaine to Storms. For this shipment, Becerra received $175,000 in three installments, one of which Valenzuela delivered on the return trip. Tr. 162-166.[11]

2. During the first day of this five-day trial, one of the jurors, Garold Graham, observed respondent

[8] These events form the basis for Count 5.

[9] The May 29 transaction formed the basis for Count 8, and the May 30 transaction formed the basis for Count 11.

[10] This transaction formed the basis for Count 12.

[11] This transaction formed the basis for Count 13.

Gagnon sketching portraits of members of the jury. He became concerned and informed the bailiff, who then informed the trial judge. Out of the presence of the jury (see Tr. 177), the court told Gagnon and his attorney that it was "very improper for a defendant to draw pictures of a jury while they're sitting in the box" and confiscated the sketches. App., *infra*, 18a; Tr. 188.

Respondent Gagnon's attorney requested the court to interview juror Graham to determine whether his concern over the incident might "be in the nature of prejudice against Mr. Gagnon." App., *infra*, 19a; Tr. 188-189.[12] The trial judge agreed. In open court (though still out of the presence of the jury), she announced (App., *infra*, 19a; Tr. 189): "I will talk to the juror in my chambers, and make a determination. We'll stand at recess." The transcript reveals that respondents and their counsel were present in the courtroom at that time (Tr. 100).

A transcript of the in-chambers conference, which is reprinted in full at App., *infra*, 19a-22a, was prepared and made available to all parties. App., *infra*, 5a. Respondent Gagnon's attorney was present and participated in questioning the juror. None of the other attorneys for the defendants or the government requested to be present or attended; nor did any of the defendants request to be personally present.[13]

At the conference, the trial judge explained to juror Graham that Gagnon is an "artist" and that

[12] None of the other defendants expressed concern over the incident.

[13] At oral argument in the court of appeals, Gagnon's attorney stated that he had been invited to the conference through a note from the judge delivered by the bailiff. App., *infra*, 10a n.1.

the sketching was "just one of those things that happened. The Court has stopped it. It won't continue." App., *infra*, 20a; Tr. 189-190. She then asked the juror whether the incident would "affect you in any way." App., *infra*, 20a; Tr. 190. The juror responded (*ibid.*):

> As far as any judgment on what's going on, it doesn't affect me. I just thought that perhaps because of the seriousness of the trial, and because of—whichever way the deliberations go, it kind of—it upset me, because—of what could happen afterwards.

The judge then inquired whether "it upset you to the extent that you couldn't judge Mr. Gagnon fairly." The juror responded, "No." The judge pursued the matter, and juror Graham repeatedly avowed that he could be fair to everyone concerned. *Ibid.*

Graham informed the judge and defense counsel that one other juror had mentioned that he had noticed Gagnon's sketching, but that this juror "didn't know what it was." App., *infra*, 20a; Tr. 191. No other jurors had mentioned observing the incident. App., *infra*, 21a; Tr. 191.

At this juncture, the trial judge asked Gagnon's attorney whether he was "satisf[ied]" with the results of the interview. The attorney posed two questions to juror Graham: whether his conversation with the bailiff had taken place in front of other jurors, and whether the incident would "prejudice you in any way against Mr. Gagnon." Graham assured the attorney that the conversation with the bailiff was in the hallway, away from the other jurors, and that he would not be prejudiced against Gagnon. App., *infra*, 21a; Tr. 191-192.

On the basis of this interview, the trial judge concluded not to dismiss the juror; she instructed him not to discuss anything about the matter with the other jurors. She then asked defense counsel whether the outcome of the conference was "agreeable with you." App., *infra*, 21a-22a; Tr. 192. Gagnon's attorney replied, "Yes," and the conference was completed. *Ibid.* Neither then nor at any other time did any of the attorneys for respondents move to disqualify juror Graham or the other juror who witnessed the sketching. Nor was any objection made to conducting the conference in the absence of the defendants.

3. The court of appeals reversed the convictions on the ground (App., *infra*, 6a-7a) that respondents' right "to be present during communications between the judge and the jury," grounded in the Constitution, principles of jury trial, and Fed. R. Crim. P. 43, was violated by the conference with juror Graham. The court held that respondents had not waived their right to be present at the conference by their failure to ask to attend. Insofar as that right is constitutionally based, the court held that the standard for waiver is the "intentional relinquishment or abandonment of a known right or privilege" test of *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)—a standard the court held was not satisfied here. App., *infra*, 11a.

The court of appeals rejected the government's argument that respondents, having failed to object to the conference at trial, could not raise the issue on appeal. Although invoking the "plain error" exception of Fed. R. Crim. P. 52(b), the court made no finding that the procedure followed by the trial court had "affect[ed] substantial rights" of the accused, as Fed. R. Crim. P. 52(b) requires. It concluded instead that "[a] criminal defendant's right to be present at every stage of his trial is so fundamental that, in certain circumstances, its violation must be noticed by a reviewing court regardless of a failure to raise the issue below." App., *infra*, 11a n.2 (citing *Rogers* v. *United States*, 422 U.S. 35, 41 (1975)).

Finally, the court of appeals found that the infringement of respondents' personal right to be present at the conference was not harmless beyond a reasonable doubt, on the ground that "[t]he presence of the defendants was necessary in order to safeguard another constitutional right—the right to an impartial jury" (App., *infra*, 13a). While "unable to say on this record that the right to an impartial jury was infringed," the court found that it could not "say with assurance that the absence was harmless." *Id.* at 13a-14a.

Judge Skopil dissented (App., *infra*, 14a-15a). He would have held that respondents' interests were adequately represented by Gagnon's counsel, and that the conference with the juror thus constituted harmless error. "It is difficult to conceive of any value from the presence of defendants and the remaining defense attorneys. Their questions would have been mere surplusage to those posed by [Gagnon's attorney] and the court." *Ibid.* Indeed, Judge Skopil stated, "[t]he added presence of the defendants and their counsel would have been * * * quite possibly detrimental to their interest." *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

This Court and the courts of appeals have frequently been called upon to address the consequences of communications between trial judge and juror out-

side the presence of the defendant.[14] This is because such communications, formal or informal, are common and often unavoidable. As this Court recently noted, "[t]here is scarcely a lengthy trial in which one or more jurors does not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial." *Rushen* v. *Spain*, No. 82-2083 (Dec. 12, 1983), slip op. 4. It is important that rules of appellate review in this area accommodate the exigencies of trial practice as well as protect the substantial rights of the accused. An approach to these issues that "ignores the[] day-to-day realities of courtroom life" will, as this Court observed, "undermine[] society's interest in the administration of criminal justice." *Id.* at 4-5.

This case involves a particularly innocuous form of conference between judge and juror—one in which defense counsel actively participates and the conference is transcribed for the record. The contrast between the reasonableness of the procedure and the sweeping and unrealistic terms of the decision below is, therefore, striking. The court of appeals held that *any* communication between judge and juror in the absence of the defendant—even if defense counsel is present and participates—is in violation of Fed. R.

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[14] See, *e.g.*, *Rushen* v. *Spain*, No. 82-2083 (Dec. 12, 1983); *Rogers* v. *United States*, 422 U.S. 35 (1975); *United States* v. *Betancourt*, 734 F.2d 750 (11th Cir. 1984); *United States* v. *Silverstein*, 732 F.2d 1338 (7th Cir. 1984), petitions for cert. pending, Nos. 84-5492 and 84-5500; *United States* v. *Head*, 697 F.2d 1200 (4th Cir. 1982), cert. denied, No. 82-1655 (June 20, 1983); *United States* v. *Ronder*, 639 F.2d 931 (2d Cir. 1981); *Henderson* v. *Lane*, 613 F.2d 175 (7th Cir.), cert. denied, 446 U.S. 986 (1980); *Nevels* v. *Parratt*, 596 F.2d 344 (8th Cir. 1979).

Crim. P. 43 and the Constitution unless the defendant has, in advance, specifically indicated his "willingness to be absent" (App., *infra*, 10a); the court also held that the potential effects of such a communication are inherently so serious that an appellate court is required to reverse even when the defendant failed to lodge an objection at trial and there is no finding of specific prejudice to the defense.

The decision below is in conflict with decisions of this Court and numerous courts of appeals. It establishes so capricious a standard as to invite—even require—needless reversals in scores of criminal cases where defense counsel (but not the defendant) has fully participated in all phases of trial, where the defendant has neither requested to be present at nor objected to the results of conferences between judge and juror, and where there is no conceivable prejudicial impact on the outcome of the trial. It has distorted the requirements of Fed. R. Crim. P. 43 and the Constitution and has virtually eliminated the requirement for a timely objection. We submit that the decision warrants review by this Court.

1. a. In *Rushen* v. *Spain*, *supra*, this Court left open the question whether a criminal defendant's constitutional right to be present at trial was violated when the trial court, with no notice to counsel and in the absence of both counsel and defendant, questioned a juror about the possibility of prejudice. Slip op. 3-4 n.2. In a concurring opinion, Justice Stevens commented (slip op. 4):

> I think it quite clear that the mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interac-

> tion between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication.

This case presents the question whether an in-chambers conference between trial judge and juror on the possibility of prejudice, conducted on the record and with full participation by defense counsel, violates a defendant's constitutional rights. We submit it does not. It also presents the parallel question under Fed. R. Crim. P. 43.

As the court of appeals recognized (App., *infra*, 5a-6a), the right to be present at trial has two sources in the Constitution, the Confrontation Clause and the Due Process Clause. The former obviously has no application to this case since a conference between judge and juror does not implicate the defendant's right "to be confronted with the witnesses against him." U.S. Const. Amend. VI; *Snyder* v. *Massachusetts*, 291 U.S. 97, 107 (1934); see *Rushen* v. *Spain*, slip op. 8 n.8 (Stevens, J., concurring); *Polizzi* v. *United States*, 550 F.2d 1133, 1138 (9th Cir. 1976).

The due process right to be present is more complicated. As the court of appeals recognized (App., *infra*, 7a), the right "is not absolute." This Court formulated the right in *Snyder*, 291 U.S. at 105-106, as follows: "the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." In other words, the Due Process Clause does not "assure[] the privilege of presence when presence would be useless, or the benefit but a shadow." *Id.* at 106-107. See also *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975) (the

accused "has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings"); *Rushen* v. *Spain*, slip op. 8 n.8 (Stevens, J., concurring) ("we have viewed a potential for prejudice as a necessary element of a violation of the right to be present").

Here, the conference with the juror was conducted at the request of respondent Gagnon's attorney, in his presence, with his active participation, and to his full satisfaction. There is no reason to suppose that Gagnon's presence would have contributed to the interview—and indeed every reason why competent counsel would advise a client against participating in such a conference.

Only a trained attorney could be expected to be able to evaluate the trial court's questions to the juror and the juror's responses in light of legal standards governing juror bias. Only a trained attorney would be in a position to propound additional questions to the juror (as Gagnon's attorney found necessary here). Gagnon could have contributed little, if anything, to this process. And even if Gagnon were dissatisfied with the conduct of the conference, he had access to transcripts and could have proposed additional questions or requested dismissal of the juror at a later time if he were so inclined. Cf. *Snyder*, 291 U.S. at 112-113.

Indeed, Gagnon's presence at the conference would have been worse than useless. The very purpose of interviewing the juror was to determine whether the effect on him of seeing Gagnon making a sketch of the jurors would undermine his fairness and impartiality. What could be more inhibiting—more likely to stifle candid responses—than the presence of Gagnon himself at the conference? The apparent basis for concern about the juror's impartiality was that

the juror might fear that Gagnon could identify, and thus retaliate against, the juror after the trial (App., *infra*, 8a). It is unlikely that the juror, if he entertained such fears, would express them frankly if Gagnon were sitting there.

The court of appeals' sole suggestion as to why Gagnon's presence at the juror interview might have been useful is, as another court said in similar circumstances, "fancifully remote." *Ware* v. *United States*, 376 F.2d 717, 718 (7th Cir. 1967). Pointing out that juror Graham had indicated that another juror had noticed Gagnon's sketching activity, the court stated (App., *infra*, 9a):

> Had Gagnon been present, he could have gauged the possibility of whether, given the distance and angle of the second juror's seating relative to himself, that second juror might have seen or guessed the subject of the pencil sketches.

However, any calculations of this sort could as easily have been performed by Gagnon's attorney as by Gagnon himself.[15] More importantly, if there had been any serious concern about the second juror, the more logical course would have been to request an interview with him. That neither trial court nor defense counsel considered it necessary or desirable to question the second juror strongly suggests that the matter was of little importance. Further, there is little connection between Gagnon's hypothetical calculations and his presence at the conference. Transcripts of

[15] Interestingly, much of the activity undertaken by counsel and the jurors in the absence of the defendants in *Snyder* consisted of evaluating distances and angles at the scene of the crime. 291 U.S. at 103-104. It apparently did not occur to this Court that such calculations might be better performed by the defendants personally.

the conference were made available to all of the parties; had Gagnon thought it useful to make calculations on the basis of juror Graham's answers, or to inquire further about the second juror, he was free to do so. He was not handicapped by his absence. See *Snyder*, 291 U.S. at 109.

Any advantage to Gagnon's co-defendants, respondents Valenzuela, Storms, and Martin, of personally attending the juror interview is even more farfetched. Only Gagnon had engaged in sketching the jurors; the other defendants were not involved. It is clear from defense counsel's own words (App., *infra*, 19a; Tr. 188-189) that the only purpose of the juror interview was to investigate possible bias against respondent Gagnon. It is therefore not surprising that only Gagnon's counsel attended the conference. In any event, the presence of Gagnon's counsel sufficed to protect the interests of the other respondents, which were plainly not at all different from—but only a more attenuated form of—those of Gagnon. See *United States* v. *Ford*, 632 F.2d 1354, 1379 (9th Cir. 1980), cert. denied, 449 U.S. 961 (1981).[16]

Under the court of appeals' hypersensitive approach to potential prejudice, it is difficult to see how the right of presence could ever be thought to be "useless, or the benefit but a shadow." *Snyder* v. *Massachusetts*, 291 U.S. at 106-107. It is tantamount to a per se rule. The court of appeals' approach thus conflicts with that taken by this Court. This Court

[16] The court of appeals suggested (App., *infra*, 8a) that the prejudice against Gagnon "may be extended to the [other defendants]," in light of the vicarious liability of co-conspirators. However, in this prosecution, each of the defendants was charged and convicted only in connection with criminal activity in which the government proved he took a direct part. See pages 3-5, *supra*. There was no *Pinkerton* charge.

has not found a due process violation in this context merely because a possibility of benefit to the defendant from presence at a trial proceeding, however slim, can be hypothesized. Indeed, in *Snyder*, the Court acknowledged that, if the defendant had been present when the jury viewed the scene of the crime, he might have been able to give valuable "suggestion or advice" to his attorney about matters the attorney should call to the jurors' attention. 291 U.S. at 113. That hypothetical possibility, however, was not enough to support a finding of a due process violation. The question is whether there is a "reasonably substantial" relation, on the facts of the case, between the right to be present and the ability to obtain a fair trial. *Id.* at 106. The relation here is far from substantial; indeed, the potential for prejudice to respondents here is more remote even than that in *Snyder*.

The analysis under Rule 43 presents a similar question. The language of the Rule, if taken literally, might be understood to require the trial court to permit the defendant to be present during any communications with a juror (except those explicitly exempted by the Rule), even when the defendant's presence would impair the court's ability to guarantee a fair trial to all parties. Such an extreme interpretation, however, finds no support in the advisory committee notes to the Rule or in precedents interpreting it. Where the court determines that a conference with a witness or juror must be conducted outside the presence of the defendant in order to obtain frank responses to serious questions, Rule 43 does not prevent it. Cf. *LaChappelle* v. *Moran*, 699 F.2d 560, 565 (1st Cir. 1983).[17] Thus, even though the scope of

[17] *LaChappelle* is a compelling illustration of this point. There, the trial judge held a private discussion, on the record, with a 16-year-old complaining witness in a rape prosecution against her father, concerning her embarrassment over describing her father's sexual climax during the incident. In open court, the witness had been so embarrassed that she refused to answer defense counsel's questions. The defendant requested to be present at the conference, but his request was denied and his objection overruled. Although *LaChappelle* arose on habeas corpus review of a state court conviction, and the constitutional standard thus applied, it is difficult to believe that Rule 43 would have required the witness's father to be permitted to attend had the prosecution been in federal court. See also *United States* v. *Howell*, 514 F.2d 710, 714 (5th Cir.), cert. denied, 423 U.S. 914 (1975) (defendant properly excluded from interview with juror who had been offered a bribe, and from subsequent discussion with counsel); *United States* v. *Ruiz-Estrella*, 481 F.2d 723 (2d Cir. 1973) (defendant properly excluded from portion of suppression hearing dealing with secret profile).

Rule 43 may be somewhat "broader" than the due process right to be present, as the court of appeals held (App., *infra*, 9a), the court nonetheless erred in finding a violation of Rule 43 here.[18] Not only was there no substantial prejudice to respondents' rights, but, we submit, the trial court would have been fully justified in denying a request by respondents to attend the conference, had it been made.

[18] The pertinent difference between Rule 43 and the constitutional right to be present at conferences between judge and juror is that the defendant may invoke the latter only when his presence would be useful to his defense, while the former creates a strong presumption in favor of the defendant's presence. Neither Rule 43 nor the Constitution guarantees the defendant's right to be present where other legitimate interests would be infringed. The court of appeals failed to recognize any limits on the Rule 43 right whatsoever, and thus erroneously reversed these convictions and set a damaging precedent for future cases.

b. Even assuming that respondents would have had a right, upon request, to attend the juror conference, there remains the question whether their failure to assert that right constituted a waiver. The court of appeals' answer to that question conflicts with decisions of this Court and other courts of appeals and with the terms of Rule 43.

The court of appeals held (App., *infra*, 11a) that the standard for waiver of the right to be present is that enunciated in *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) ("intentional relinquishment or abandonment of a known right or privilege"). Since there was no evidence in the record directly establishing that respondents had made a conscious, informed decision to absent themselves from the juror conference, the court of appeals could not "conclude that they knowingly and intelligently waived their constitutional right to be present" (App., *infra*, 11a).

We note initially that this analysis depends for its validity on the premise, shown to be erroneous in the preceding discussion, that any right the respondents had to attend the conference was constitutionally based. But even were that premise correct, the wrong waiver standard was employed by the court of appeals. Indeed, its holding is in direct conflict with *Taylor* v. *United States*, 414 U.S. 17, 19-20 (1973). There, the Court held that the *Johnson* v. *Zerbst* standard is inapplicable to a defendant's waiver of the right to be present at trial, even for portions as critical as the taking of evidence. The voluntary absence of the defendant from the proceeding, without more, constitutes a valid waiver.

There are sound reasons not to apply the *Johnson* v. *Zerbst* standard in situations of this kind. The benefit of some rights (the right to be present among

them) may be realized as well by waiving them as by asserting them. The question before Gagnon and his attorney was not whether Gagnon should "relinquish" or "abandon" a valuable constitutional right, but whether it was more in Gagnon's interest to be absent from or present at the juror interview. "Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, * * * rests with the accused and his attorney." *Estelle* v. *Williams*, 425 U.S. 501, 512 (1976).

Estelle v. *Williams* presents a close analogy to this case. There, the Court considered whether a criminal defendant who does not ask to wear civilian clothes is denied due process of law by trial in prison garb. Observing that "it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury" (425 U.S. at 508), the Court held that a defendant is required to object to being tried in jail garments (*ibid.*). The Court expressly rejected the notion that a "strategic and tactical" decision of this sort, made by a defendant advised by competent counsel, is to be measured against the *Johnson* v. *Zerbst* standard for intentional relinquishment of a constitutional right. 425 U.S. at 508 n.3. Accordingly, the Court reasoned, the trial judge is not required to "ask[] the [defendant] or his counsel whether he was deliberately going to trial in jail clothes." The failure to make an objection, for whatever reason, is "sufficient to negate the presence of compulsion necessary to establish a constitutional violation." *Id.* at 512-513.

The answer here follows *a fortiori* from *Estelle*. No less clearly "strategic and tactical" than the decision to stand trial in prison garb is the defendant's

decision not to attend a juror conference. See *Polizzi* v. *United States*, 550 F.2d at 1137. As noted at pages 13-14, *supra*, there are persuasive (often compelling) reasons why a criminal defendant would prefer to be absent rather than to chill the juror's willingness to answer candidly. A defendant's failure to invoke the right to attend, or to object to the proceeding, is therefore sufficient to establish that his absence was voluntary.[19]

The analysis is unchanged when the focus shifts to Rule 43. Rule 43(a) provides that "[t]he defendant shall be present at * * * every stage of the trial * * * except as otherwise provided by this rule." Rule 43(b) provides that "the defendant shall be considered to have waived his right to be present whenever a defendant, initially present, (1) voluntarily absents himself after the trial has commenced * * *." Here, respondents plainly waived their right to be present when they did not attend, and made no request to attend, the juror interview.

The court of appeals rejected the government's argument that respondents had waived their Rule 43 right to be present, on the ground that there was no indication in the record "of whether Gagnon or the other defendants expressly or impliedly indicated their willingness to be absent from the conference" (App., *infra*, 10a).[20] On this issue, the court declared

[19] As in *Estelle*, 425 U.S. at 512 n.9, it is irrelevant whether the decision not to attend the conference was "a defense tactic or simply indifference. In either case, respondent's silence precludes any suggestion of compulsion."

[20] The court of appeals apparently thought that this standard is less "stringent" than the *Johnson* v. *Zerbst* standard it applied to the constitutional right to be present at trial. App., *infra*, 11a. However, as this Court observed in *Estelle*, 425 U.S. at 512, to require the trial court to make inquiries regarding the voluntariness of an act would be equivalent to imposing the *Johnson* v. *Zerbst* standard. In any event, this Court has applied the same analysis to waiver of the right to be present at trial under both Rule 43 and the Constitution, without distinction. Failure by a criminal defendant, represented by competent counsel, to invoke his right to be present at a conference between judge and juror constitutes a valid waiver.

it irrelevant that none of the defendants asked to attend.[21] The holding below is thus contrary to the plain language of Rule 43 and to decisions of this Court.

By its terms, Rule 43(b) provides that a defendant "shall be *considered to have waived* his right to be present" (emphasis added) if he "voluntarily absents himself after the trial has commenced." Deeds are all; there is no additional requirement that the defendant express or imply anything about his "willingness to be absent." Nor is the trial court required to address specific inquiries to the defendant to ensure that he was aware of, and voluntarily waiving, his right. On these matters, as with the vast majority of questions that arise during trial, our system relies on counsel to assert the defendant's rights where appropriate.[22]

Accordingly, most courts of appeals to consider the issue have concluded that a defendant waives his right to attend a conference at the bench or in chambers if he does not object or request to attend. See,

[21] The court stated that respondents' failure to object was relevant to the question of prejudice, but not to the question of voluntary absence, or waiver. App., *infra*, 10a-11a.

[22] The advisory committee notes to Rule 43 confirm this analysis. The notes state that "voluntary absence may constitute a waiver even if the defendant has not been informed by the court of his [right] to remain during the trial."

e.g., *United States* v. *Washington*, 705 F.2d 489, 497 (D.C. Cir. 1983); *United States* v. *Provenzano*, 620 F.2d 985, 998 (3d Cir.), cert. denied, 449 U.S. 899 (1980); *United States* v. *Bufalino*, 576 F.2d 446, 451 (2d Cir.), cert. denied, 439 U.S. 928 (1978); *United States* v. *Brown*, 571 F.2d 980, 987 (6th Cir. 1978). This conflict among the circuits should be resolved.

2. Not only did respondents make no attempt to attend the juror interview; they also made no objection to the proceeding when it occurred or at any point during the trial. Accordingly, even assuming that respondents' rights under Rule 43 or the Constitution were in fact violated under the circumstances of this case, the court of appeals was not justified in reversing on that basis.[23] *United States* v.

[23] It seems clear that the contemporaneous objection requirement applies to a supposed infringement of the right to be present at trial. Had the error been called to the attention of the trial judge before the end of trial, he could have cured any possible prejudice by substituting the alternate jurors for the two jurors who observed respondent Gagnon sketching. The obligation to afford the trial court an opportunity to remedy an error at trial is the principal basis for the contemporaneous objection requirement. *Estelle* v. *Williams*, 425 U.S. at 508 n.3.

But even assuming defendants were under no obligation to object in order to preserve this issue for appeal, no reversible error resulted from the juror interview. A denial of the right to be present at trial does not warrant reversal of a conviction unless it resulted in prejudice to the defense. *Rushen* v. *Spain*, *supra*. We believe that the court of appeals was clearly incorrect in its conclusion (App., *infra*, 13a-14a) that respondents' absence from the juror interview was not harmless error. Indeed, we believe their absence enhanced their ability to secure a fair trial before an impartial jury. See pages 13-14, *supra*. In this connection, we would note that the court's application (App., *infra*, 13a) of the constitutional harmless error standard to what we have shown above was at most a violation of Rule 43 (see pages 16-17, *supra*) was in error.

Frady, 456 U.S. 152, 163 & nn.13-14 (1982); *Estelle* v. *Williams*, 425 U.S. at 508-509 & n.3; see Br. for the United States at 26-35, in *United States* v. *Young*, No. 83-469 (argued Oct. 2, 1984).[24] Cf. Fed. R. Crim. P. 30.

The court below held, however, that the error could be noticed under the "plain error" exception of Fed. R. Crim. P. 52(b) even though it had not been brought to the attention of the trial court. But the court did not make the finding of substantial prejudice, or "miscarriage of justice," necessary to justify reversal under Rule 52(b). See *Frady*, 456 U.S. at 163 & nn.13-14. The court of appeals held that "[a] criminal defendant's right to be present at every stage of his trial is so fundamental that, in certain circumstances, its violation must be noticed by a reviewing court regardless of a failure to raise the issue below" (App., *infra*, 11a n.2). By this, the court apparently meant that the right to be present is so fundamental that *in all circumstances* its violation must be noticed by the appellate court.[25] That holding is plainly wrong, and is in direct conflict with

[24] Copies of our brief in *Young* have been provided to counsel for respondents.

[25] We can agree that, "in certain circumstances" (App., *infra*, 11a n.2), the denial of the right to be present might well be so fundamental an error that it should be noticed by an appellate court even in the absence of a timely objection. See, *e.g.*, *Rogers* v. *United States*, 422 U.S. 35, 41 (1975). However, the court of appeals did not, as its statement of the law would suggest, inquire whether in fact there were any circumstances here (*i.e.*, substantial prejudice to the defense) that would warrant a finding of plain error. We therefore interpret the court as holding that no finding of substantial prejudice is required.

Rushen v. *Spain*, *supra*, *Rogers* v. *United States*, 422 U.S. 35 (1975), and numerous decisions by other courts of appeals.[26]

In *Rushen*, this Court "emphatically" held (slip op. 3), in circumstances far more troubling than these, that an infringement on the right to be present during communications between judge and juror may have so little impact on the fairness of the trial that it is harmless error.[27] Put differently, a court of appeals may not *presume*, on the basis of the nature of the right, that the error had sufficient impact to justify reversal of a conviction. Slip op. 3. It follows, *a fortiori*, that an infringement on the right to be

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[26] For an error to be "plain," it must be both *obvious* and substantially *prejudicial*. Although the focus of the discussion to follow is on the court of appeals' failure to make a finding of substantial prejudice, we would also point out that the error (if it was error) was far from obvious. Indeed, our position is that it was not error at all. See pages 12-22, *supra*. Even if this Court disagrees, we would submit that the question of the correctness of the trial court's actions is, at worst, a close one.

[27] Both this case and *Rushen* involve conferences between the trial judge and a juror without the defendant being present. In *Rushen*, however, no defense counsel was present; indeed, the defendants did not even find out about the conference until after trial (slip op. 2). Here, by contrast, the conference was announced in open court and attended by defense counsel. Further, in *Rushen*, no transcript was made of the conference; the defendants or a reviewing court therefore had no reliable means of knowing what transpired. Here, a transcript was prepared and available to all parties. If the error in *Rushen* could be held to be harmless, the error here, if any, could hardly be plain error.

Rushen was decided by this Court four days after the court of appeals rendered the judgment below, but it was forcefully called to the court's attention by the government's unsuccessful petition for rehearing.

present cannot be *presumed* to violate the "substantial rights of the accused" or to be a "miscarriage of justice"—standards significantly more exacting than the harmless error standard.

The court of appeal's abjuration of the "substantial prejudice" analysis under Rule 52(b) also conflicts with *Rogers* v. *United States*, *supra*. There, the Court concluded that a reviewing court could notice an error that included a denial of the right to be present during communications between judge and jury, in the absence of a timely objection, where the error was "fraught with potential prejudice" (422 U.S. at 41).[28] In the absence of a finding of substantial prejudice—or so *Rogers* would indicate—there would be no basis for reaching the issue.

It is difficult to see how the court of appeals could have concluded that there was a miscarriage of justice here, had it engaged in an appropriate "plain error" analysis. As noted, the presence of respondents at the juror interview would have been useless or worse than useless. The court of appeals' own suggestion as to prejudice, as has been shown, was fanciful. And finally, the underlying issue—the impartiality of the jurors who observed respondent Gagnon sketching—was resolved by the trial court, on the basis of an interview with the principal juror in question. The question of juror impartiality is heavily dependent on the trial court's assessment of the sincerity of the juror's answers. There is nothing in the record that would justify an appellate court in overturning the trial court's conclusion that the jury

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[28] In *Rogers*, the trial court, without notifying the defendant or defense counsel, made a misleading written response to a query from the jury. The possibility that the error affected the jury's verdict was substantial.

panel would not be tainted by the sketching incident. See *Rushen* v. *Spain*, slip op. 6. This is especially true since defense counsel expressly agreed with the trial court's decision at trial.

Many courts of appeals, in factual circumstances similar to or worse than these, have concluded that there was no prejudice to the defendant from a denial of his right to be present at every stage of trial. The reasoning, as well as the result, of these decisions is in direct conflict with the decision below.[29] See, *e.g.*, *United States* v. *Brown*, 571 F.2d 980, 987 (6th Cir. 1978) (defendant's absence from conference in chambers regarding dismissal of juror was not prejudicial given defense counsel's presence and the availability of a transcript of the proceeding; furthermore, the issue was waived by failure to object); *Henderson* v. *Lane*, 613 F.2d 175, 179 (7th Cir.), cert. denied, 446 U.S. 986 (1980) (defendant's absence from examination of alternate jurors was harmless because counsel was present, proceeding was on the record, and defendant had been present during original jury selection); *United States* v. *Washington*, 705 F.2d 489, 498 (D.C. Cir. 1983) (defendant's absence from colloquy at bench with potential jurors was harmless because counsel was present and took notes); *Nevels* v. *Parratt*, 596 F.2d 344 (8th Cir. 1979) (defendant's absence from conference with juror concerning possible misconduct was harmless; defense counsel participated in conference, no request for defendant to attend was made, and State had shown that juror in question remained impartial);[30] see also *United States* v. *Walls*, 577 F.2d 690, 697-699 (9th Cir.), cert. denied, 439 U.S. 893 (1978) (defendant's absence from conference with juror harmless because counsel was present, the conference was on record, and no objection was raised). The decision below conflicts even more strikingly with decisions finding the absence of the defendant from a stage of the proceeding harmless even though defense counsel was *not* present. *E.g.*, *United States* v. *Yonn*, 702 F.2d 1341, 1344-1345 (11th Cir. 1983); *United States* v. *Dominguez*, 615 F.2d 1093, 1094-1096 (5th Cir. 1980); *United States* v. *Bufalino*, 576 F.2d 446, 451 (2d Cir.), cert. denied, 439 U.S. 928 (1978).

The conclusion is inescapable that the convictions in this case for serious crimes involving hundreds of thousands of dollars in wholesale narcotics trafficking were needlessly reversed. Moreover, it is apparent that many future convictions could suffer the same fate under the court of appeals' tortured understanding of the right to be present at trial and the defendant's lack of any obligation to assert that right at a

[29] Although the analysis of prejudice in the decisions discussed in text is sometimes under the rubric of "harmless error" rather than "plain error," that fact does not detract from the conflict in the circuits. If an error is so nonprejudicial that it is harmless, it obviously falls short of the stringent "miscarriage of justice" standard for finding plain error. See *United States* v. *Silverstein*, 732 F.2d at 1349.

[30] On the issue of prejudice, the decision below also conflicts with *United States* v. *Silverstein*, 732 F.2d at 1348-1349 (defendant's absence from courtroom while the trial court formulated a response to a query from the jury not reversible error because defense counsel was present, no objection was made, and the outcome of the trial was not likely affected). *Silverstein* differs from the instant case in that the proceeding from which the defendants were absent was a conference between trial court and counsel on an issue of law. Such conferences are expressly permitted to be held in the absence of the defendant under Fed. R. Crim. P. 43(c)(3), and the convictions in *Silverstein* could have been affirmed on that ground.

time when it could be accommodated. This Court recently summarily reversed a Ninth Circuit decision that opened the gate to reversals on the basis of the right to be present, without regard to whether the supposed violations were prejudicial to the defense. *Rushen* v. *Spain*, *supra*. The instant decision, from the same court of appeals, is in a similar vein, but with potentially more far-reaching consequences.[31]

It was in precisely the same context of a supposed infringement on the right to be present that this Court stated in *Snyder* v. *Massachusetts*, 291 U.S. at 122:

> There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to * * * law, and set the guilty free.

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[31] In *Rushen*, the only issue was whether an assumed violation of the right to be present at trial was subject to a "harmless error" analysis. Here, the question is whether criminal defendants will be permitted to remain silent at trial, and then obtain reversal of convictions on the basis of insubstantial claims of prejudice. The disruptive effect of the decision below could be significant.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 82-1289, 82-1310, 82-1311 and 82-1350

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROBERT PAUL GAGNON, PEDRO VALENZUELA,
DONALD P. STORMS, GLENN E. MARTIN,
DEFENDANTS-APPELLANTS

Argued and Submitted April 12, 1983

Decided Dec. 8, 1983

Appeal from the United States District Court
for the District of Arizona

Before WISDOM,* SKOPIL and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

Defendants were convicted after a jury trial of conspiracy to possess cocaine with intent to distribute

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* Hon. John Minor Wisdom, Senior United Circuit Judge for the Fifth Circuit, sitting by designation.

and related felony drug offenses. They appeal on numerous grounds, most of which are disposed of by memorandum decision of this date. We deal here only with the contention that the trial court committed reversible error by questioning a juror during the course of the trial outside the presence of any of the defendants. We agree and reverse the convictions.

FACTS

On the first day of trial, one of the jurors noticed defendant Gagnon sketching portraits of jury members. Juror Garold Graham became alarmed and informed the bailiff, who in turn informed the judge. Out of the presence of the jury, the judge told Gagnon that it was "very improper for a defendant to draw pictures of a jury while they are sitting in the box." She confiscated the sketches and ordered Gagnon to refrain from any further drawing.

Counsel for Gagnon asked the court to determine which juror had noticed the sketching and to arrange for questioning of that juror. The judge met with Graham in the presence of Gagnon's attorney, Robert Wolkin, in her chambers. None of the defendants were present, nor were counsel for the government or for the other defendants. The following took place:

> THE COURT: Let the record show that we are meeting in chambers. Mr. Wolkin is present.
>
> For the record, would you give us your name.
>
> MR. GRAHAM: Garold Graham.
>
> THE COURT: Mr. Graham, the bailiff gave me your note. As you know, Mr. Wolkin is Mr. Gagnon's attorney; the man who was sketching in the courtroom.

> MR. GRAHAM: Yes.
>
> THE COURT: Mr. Gagnon is an artist. It was just one of those things that happened. The Court has stopped it. It won't continue.
>
> However, if because of this you feel like you couldn't be—you know—that that would affect you in any way, then I want you to tell us about it.
>
> MR. GRAHAM: As far as any judgment on what's going on, it doesn't affect me. I just thought that perhaps because of the seriousness of the trial, and because of—whichever way the deliberations go, it kind of—it upset me, because —of what could happen afterwards.
>
> THE COURT: Well, do you feel that it upset you to the extent that you couldn't judge Mr. Gagnon fairly—
>
> MR. GRAHAM: No.
>
> THE COURT: —as you would all the others?
>
> MR. GRAHAM: No.
>
> THE COURT: You could be fair to everyone concerned; you're sure of that?
>
> MR. GRAHAM: Yes.
>
> THE COURT: Because if you don't think you could, now is the time to tell us about it.
>
> MR. GRAHAM: I can be fair.
>
> THE COURT: I'm glad you brought it to our attention. I didn't notice it, and counsel didn't—
>
> MR. GRAHAM: I noticed him looking at certain people, and I noticed him looking at me one particular time there; and I didn't know what was going on, until just before the recess. He had pulled his paper up there, and I could

see him drawing portraits. And one of the other gentlemen in there had mentioned that he had also seen something of him doing—some sketching, but he didn't know what it was.

THE COURT: Has anybody else mentioned it?

MR. GRAHAM: No.

THE COURT: Does that satisfy you?

MR. WOLKIN: I'm just wondering about the conversation between the juror and the bailiff; whether that was said in front of the jury or not.

MR. GRAHAM: No. I talked with the bailiff in the hallway, after everyone had gotten in.

THE COURT: So nobody else heard you say anything about this?

MR. GRAHAM: No.

THE COURT: Well, we have the pictures. It won't continue. And we'll just go ahead as we are.

If you feel safe, secure—

MR. GRAHAM: Right.

THE COURT: You would feel comfortable in continuing serving as a juror?

MR. GRAHAM: I feel comfortable.

MR. WOLKIN: This wouldn't prejudice you in any way against Mr. Gagnon?

MR. GRAHAM: No.

THE COURT: Because, of course, it was just inadvertence—as an artist, I guess—he just did it.

Okay. Thank you very much. I would ask you not to bring this up with the other jurors, if you would please.

MR. GRAHAM: Okay.

THE COURT: I mean, don't say anything about the pictures, or about anything else that has transpired here.

MR. GRAHAM: Yes, ma'am.

THE COURT: But I can assure you that the pictures are here, and that there won't be anymore.

MR. GRAHAM: Thank you.

THE COURT: Okay. Is that agreeable with you?

MR. WOLKIN: Yes.

THE COURT: Very well.

(RT 189-192).

A transcript of the *in camera* proceeding was available to all of the parties, and no defendant objected to the proceeding during the trial. On appeal, however, all four defendants allege that this proceeding violated their sixth amendment right to an impartial jury and their statutory right to be present at every stage of their trial.

We have not considered whether the effect of this incident violated the defendants' right to an impartial jury as we have not found that one or more jurors was actually biased against any of the defendants. However, because the defendants' right to be present at all stages of the trial was violated, that violation may have operated to allow a biased member to remain on the jury.

ANALYSIS:

I. *The Right of Presence*

The right of a criminal defendant to be present at every stage of his trial has been variously character-

ized as guaranteed by the due process clause of the fifth (and, in state cases, the fourteenth) amendment, the confrontation clause of the sixth amendment, or some combination thereof. *See, e.g., Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970) (confrontation clause); *Snyder v. Massachusetts*, 291 U.S. 97, 108-08, 54 S.Ct. 330, 332-33, 78 L.Ed. 674 (1934) (due process); *Bustamante v. Eyman*, 456 F.2d 269, 273 (9th Cir. 1972) (confrontation clause and due process). The precise source of the right often depends on the context in which the alleged violation occurred. *See Shields v. United States*, 273 U.S. 583, 588, 47 S.Ct. 478, 479, 71 L.Ed. 787 (1927) ("rule of orderly conduct of jury trial"). Regardless of its source, the right itself has been recognized throughout the development of American criminal jurisprudence. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." *Lewis v. United States*, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1892).

However, "it has seldom been necessary to plumb the federal constitutional depths of the principle," *Bustamante*, 456 F.2d at 273, because most jurisdictions recognize the principle through statute or rule. In federal criminal trials, the right is codified in Fed. R. Crim. P. 43. With a few specific exceptions not relevant here, Rule 43 requires the presence of the defendant "at every stage of the trial including the impaneling of the jury and the return of the verdict."

The constitution, principles of jury trial, and Rule 43 all guarantee a defendant the right to be present during communications between the judge and the

jury. *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct. 2091, 2094, 45 L.Ed.2d 1 (1975) (Rule 43 and prior decisions); *Shields*, 273 U.S. at 588-89, 47 S.Ct. at 479 (orderly conduct of jury trial); *Bustamante*, 456 F.2d at 273 (constitutional right). However that guarantee is not absolute. The defendant's presence is not required in those situations where his presence would be useless, or the benefit but a shadow. *Snyder v. Massachusetts*, 291 U.S. at 108, 54 S.Ct. at 333 (no constitutional right to accompany the jury on a view because the defendant's absence could have no effect); *see also Faretta v. California*, 422 U.S. 806, 819 n. 15, 95 S.Ct. 2525, 2533 n. 15, 45 L.Ed.2d 562 (1975).

Generally, the absence of a defendant from an *in camera* conference between a juror and the court where the court seeks to determine the juror's bias is held to be harmless error either because the conference dealt with an issue of law and was thus exempt under Fed. R. Crim. P. 43(c) or because the defendant's rights were fully protected by counsel.

In *United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974), the possibility of juror bias against the defendant arose from newspaper publicity about the case printed during trial. The court found:

> When the possibility of prejudice from publicity arises during trial, the trial court has "the affirmative duty . . . to take positive action to ascertain the existence of improper influences on the jurors' deliberative qualifications and to take whatever steps are necessary to diminish or eradicate such improprieties." *Silverthorne v. United States*, 400 F.2d 627, 643 (9th Cir. 1978) [other citations omitted]. The better practice, if

> there is a clear chance of prejudice, is for the court to interrogate each juror *in camera* about the possibly prejudicial publicity.

Id. at 880. However, the issue is not as simple in the instant case. The potential bias here did not arise from *outside* sources such as newspaper reports with which the defendant had no connection. Rather it arose through the in-court activities of the defendant which not only took place in the presence of the jury, but directly involved the jury. The government relies upon this reasoning to argue that the presence of defendants Valenzuela, Storms and Martin, who were not even represented by counsel at the *in camera* proceeding, was unnecessary as only defendant Gagnon was involved.

However, in a conspiracy case the evidence presented must link the defendants together in order to establish concert of action. A co-conspirator is vicariously liable for the acts of another co-conspirator even though he may not have directly participated in those acts, his role in the crime was minor, or the evidence against a co-defendant more damaging. *United States v. Saavedra*, 684 F.2d 1293, 13001-01 (9th Cir. 1982), *citing United States v. Basey*, 613 F.2d 198, 202 (9th Cir. 1979), *cert. denied*, 446 U.S. 919, 100 S.Ct. 1854, 64 L.Ed.2d 274 (1980). Therefore, since the evidence against one defendant may be used against another, it is not unreasonable to fear that the prejudice against one may be extended to the others, especially under the facts of this case, where juror Graham apparently felt concern about the possibility of future retaliation. Therefore, we cannot say that Gagnon's co-defendants had no stake in the determination of whether Graham could con-

tinue to be impartial, nor can we say that Gagnon's counsel could effectively safeguard their interests.

As to defendant Gagnon, although his attorney proclaimed himself satisfied with Graham's statements, the juror did indicate that another juror had also noticed Gagnon's activities. Had Gagnon been present, he could have gauged the possibility of whether, given the distance and angle of the second juror's seating relative to himself, that second juror might have seen or guessed the subject of the pencil sketches.

Even if we were convinced that the presence of some or all of the defendants would have been but a "shadow" of benefit to them, so as to foreclose their due process right to attend the proceeding under *Snyder*, this circuit has stated that the protection offered by Rule 43 "is broader than the sixth amendment right to confrontation and the fifth amendment due process rights." *United States v. Christopher*, 700 F.2d 1253, 1261-62 (9th Cir. 1983); *accord United States v. Turner*, 532 F.Supp. 913, 916 (D.C. Cal. 1982).

II. *Waiver*

Rule 43 does, of course, make provision for the absence of a defendant without written consent in certain situations. Under subsection (c), no written consent is required for a corporation to appear by counsel, or for a defendant to be absent during discussion of a question of law or at a reduction of sentence. *United States v. Veatch*, 674 F.2d 1217, 1225-26 (9th Cir. 1981). These situations are not applicable here. Rule 43(b) also provides that "the defendant shall be considered to have waived his right to be present" when he:

> (1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or (2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

There is no contention that Gagnon's behavior was disruptive within the meaning of Rule 43(b)(2), and the behavior of the other defendants was not even an issue in the *in camera* proceeding. Thus the question posed is whether Gagnon and/or the other defendants waived their right to be present by voluntarily absenting themselves.

As in *United States v. Ford*, 632 F.2d 1354, 1379 (9th Cir. 1980), "[a]lthough the record suggests that [the defendant]'s absence was voluntary, we cannot conclusively determine that it was." (Footnote omitted). The record shows that the district judge announced in open court her intention to question juror Graham in chambers, but does not disclose how it came about that only Mr. Wolkin (Gagnon's attorney) attended the conference.[1] There is no indication of whether Gagnon or the other defendants expressly or impliedly indicated their willingness to be absent from the conference. It is true that none of the defendants objected to the *in camera* proceeding during the remainder or at the close of trial, but under our analysis in *Ford*, that fact is relevant only to the

[1] At oral argument on appeal, Wolkin stated that he was invited to the conference through a note from the judge delivered by the bailiff.

question of resulting prejudice, not to the question of voluntary absence. 632 F.2d at 1379.[2]

The standard for determining whether a criminal defendant has waived a constitutional right is even more stringent than that provided by Rule 43(b), requiring "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1958). Since we are unable to conclude that defendants voluntarily absented themselves within the meaning of Rule 43(b), *a fortiorari* we cannot conclude that they knowingly and intelligently waived their constitutional right to be present.

[2] The government argues that because none of the defendants objected to the *in camera* proceeding during the trial, they may not raise the issue on appeal. The short answer to that contention is that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b). A criminal defendant's right to be present at every stage of his trial is so fundamental that, in certain circumstances, its violation must be noticed by a reviewing court regardless of a failure to raise the issue below. *Rogers v. United States*, 422 U.S. 35, 41, 95 S.Ct. 2091, 2095, 45 L.Ed.2d 1 (1975) (violation of Rule 43 raised by Supreme Court *sua sponte*). We are aware of our holding in *Polizzi v. United States*, 550 F.2d 1133, 1137 (9th Cir. 1976), that an objection to the defendants' absence need not be considered on a motion for relief under 28 U.S.C. § 2255 (the federal counterpart of habeas corpus) when the objection was not raised either during the trial or on appeal of the conviction. Such a holding neither prevents a court from noticing the objection, nor addresses the situation of a defendant who does raise the objection on apeal. We note also that such an issue was considered on appeal in *United States v. Ford*, 652 F.2d at 1378-79, despite a failure to raise it before the trial court.

III. *Harmless Error Rule*

Although we have determined that defendants' constitutional and statutory rights were violated by an examination of a potentially biased juror in their absence, we must make one further inquiry. With a few notable exceptions, the violation of a constitutional right does not require reversal if the violation was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 21-22, 87 S.Ct. 824, 826-827, 17 L.Ed.2d 705 (1967). The government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24, 87 S.Ct. at 828. The burden is on the government to establish this. *Id.* at 24-26, 87 S.Ct. at 828-829. And Rule 43 must be read in conjunction with Rule 52(a), which provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." This circuit stated in *United States v. Ford*, 632 F.2d at 1379 n.28:

> *Akins v. Cardwell*, 500 F.2d 47, 47 (9th Cir. 1974) (per curiam), suggests that a presumption of prejudice arises when any portion of trial occurs during a defendant's or his counsel's absence, and that the government must clearly rebut that presumption. However, our more recent cases do not follow the *Akins* presumption. In *United States v. Cassasa*, 588 F.2d 282 (9th Cir. 1978), *cert. denied*, 441 U.S. 909, 99 S.Ct. 2003, 60 L.Ed.2d 379 (1979), for example, we responded to the defendant's presumption of prejudice argument by stating that: "[c]ounsel's absence during judge-jury communication is harmless error if no reasonable possibility of prejudice could result." *Id.* at 285. Thus, the government bears the burden of proving that the defendant's absence was harmless only if the absence presents a reasonable possibility of prejudice. For reasons set forth in the text, we conclude that no reasonable possibility of prejudice to Armstrong arises from the reading of the Scannell testimony in his absence.

We need not resolve this apparent conflict in precedent. We have stated in Part I, *supra*, that a reasonable possibility of prejudice arose with regard to all defendants, and thus under either the *Akins* or *Ford* test, the burden in this case must rest on the government.

Whether the government must prove that a violation of Rule 43 is harmless beyond a reasonable doubt or to some lesser degree of certainty has not been specifically addressed in this circuit. *Cf. United States v. Reynolds*, 489 F.2d 4 (6th Cir. 1973), *cert. denied*, 416 U.S. 988, 94 S.Ct. 2395, 40 L.Ed.2d 766 (1974) (error reversible if any reasonable possibility of prejudice); *United States v. Freed*, 460 F.2d 75 (10th Cir. 1972) (standard is clear prejudice). Few of our cases have had reason to explore that area of the Rule 43 presence right that is outside constitutional protection. Given our prior finding that the defendants' due process rights were violated by proceeding in their absence without determining whether the absence was voluntary, we need only assess the prejudice in this case under a "harmless beyond a reasonable doubt" standard.

We cannot find the error here to be harmless beyond a reasonable doubt. The presence of the defendants was necessary in order to safeguard another constitutional right—the right to an impartial jury. While we cannot say on this record that the right to

an impartial jury was infringed, we also cannot say with assurance that the absence was harmless.

The district court is REVERSED.

SKOPIL, Circuit Judge, dissenting:

I agree that the district court erred in examining the juror without all defendants present. I also agree that we must reverse unless the government is able to prove beyond a reasonable doubt that this error did not contribute to the verdicts. I believe, however, that the government met its burden here.

Prior to examining the juror in-chambers in the presence of defense attorney Wolkin, the judge stated in open court her intention to conduct the examination. Despite being aware that the court recessed for the specific reason of examining the juror, none of appellants' counsel objected to it being conducted in their absence. Their failure to object is to be considered when determining whether the error was harmless. *United States v. Ford*, 632 F.2d 1354, 1379 (9th Cir. 1980); *United States v. Walls*, 577 F.2d 690, 698 (9th Cir.), *cert. denied*, 439 U.S. 893, 99 S.Ct. 251, 58 L.Ed.2d 239 (1978).

Appellants' attorneys not only failed to object to the examination, but attorney Wolkin was present to guard against any irregularities. *Ford*, 632 F.2d at 1379; *United States v. Friedman*, 593 F.2d 109, 121 (9th Cir. 1979). Defendants charged with conspiracy have similar interests. Attorney Wolkin exercised his opportunity to question the juror directly and came away satisfied of his impartiality. At the end of the examination, he expressed his agreement with the court's conclusion not to remove the juror. It is difficult to conceive of any value from the presence of defendants and the remaining defense attorneys.

Their questions would have been mere surplusage to those posed by attorney Wolkin and the court.

The examination at issue was made part of the official record. In *Spain v. Rushen*, 543 F. Supp. 757, 770 (N.D.Cal. 1982), *aff'd without opinion*, 701 F.2d 186 (9th Cir. 1983), no record was made of the conversations between judge and juror. This private nature prevented any error from being "readily apparent on the record." Here, no objection was registered by defendants over the subject matter or the conduct of the examination. Review of the record suggests why defendants did not object.

After assuring the juror that the drawing by Mr. Gagnon would cease, the court asked the juror whether he was upset to the extent that he could not judge Mr. Gagnon and the others fairly. The juror responded negatively. The court then posed other similar questions. The juror indicated that he would continue to be impartial. Attorney Wolkin's question elicited the same response. Upon terminating the examination the court properly instructed the juror to not discuss the matter with other jurors. *Id.* at 767.

The examination of the juror in the absence of all but one defense attorney was harmless error. The added presence of the defendants and their counsel would have been superfluous and quite possibly detrimental to their interest. *Polizzi v. United States*, 550 F.2d 1133, 1137 (9th Cir. 1976). The district court clearly did not abuse its discretion in determining that the juror would remain impartial. *United States v. Perez*, 658 F.2d 654, 663 (9th Cir. 1981). The court and attorney Wolkin were aware of the potentially damaging influence and their questions were directed to that end. The juror consistently responded that he would remain fair and impartial. More specific questioning was unnecessary.

I would affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 82-1289
82-1310
82-1311
82-1350

DC No. CR 81-205-MAR
Arizona

UNITED STATES OF AMERICA, APPELLEE

v.

ROBERT PAUL GAGNON, PEDRO VALENZUELA,
DONALD P. STORMS, GLENN E. MARTIN, APPELLANTS

[Filed Aug. 29, 1984]

ORDER

Before: WISDOM,* SKOPIL and FERGUSON, Circuit Judges.

A majority of the members of the panel that decided this case, Judges Wisdom and Ferguson, has voted to deny the petition for rehearing. Judge Skopil has voted to grant the petition for rehearing. Judges Skopil and Ferguson have voted to reject the

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* Hon. John Minor Wisdom, Senior United [States] Circuit Judge for the Fifth Circuit, sitting by designation.

suggestion for a rehearing en banc; Judge Wisdom makes no recommendation.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

* * * * *

APPENDIX C

[187] THE COURT: I guess we better bring this up in court. One of the jurors indicated t/ Mr. Sholder that he was—they were concerned—and I don't know which one—that Mr. Gagnon—excuse the pronunciation—was drawing pictures of the jury.

MR. WOLKIN: Your Honor, I have—I was just handed a note. And I'm just wondering whether this note should be made part of the record or not. Did this come from one of the jurors? Or the bailiff?

MR. SHOLDER: No. What happened, one of the jurors told me that he felt—your client was drawing pictures of the jury, and he seemed worried about it.

MR. WOLKIN: Yes. And I would like to—

THE COURT: Well, are you drawing pictures of the jury?

MR. WOLKIN: Yes, your Honor, he is; and, good ones, actually.

[188] THE COURT: Well, that is very improper—

MR. WOLKIN: Okay.

THE COURT: —for a defendant to draw pictures of a jury while they're sitting in the box. I don't even allow the press without permission. I think it is very inappropriate, and I'll ask you not to do it anymore; and to turn over the pictures that you've drawn to the Court, please.

MR. WOLKIN: Well, wait a minute. Your Honor, I don't think I had an answer to my question as to—did you write this?

MR. SHOLDER: Yes.

THE COURT: Yes, he wrote it.

MR. WOLKIN: Oh, okay.

THE COURT: This was by word of mouth.

MR. WOLKIN: Okay.

THE COURT: So the record may show—you can read the note into the record, if you wish.

MR. WOLKIN: Well, I have two quick things. Well, the note from the bailiff says, "One of the jurors said Mr. Gagnon was drawing portraits of the jurors, and seemed concerned about it."

Your Honor, I don't know what the nature of the concern would be, and I would ask the Court at this time to find out which juror it is, and—and perhaps the Court [189] ought to direct some questions to that juror and find out whether the concern that is being expressed, whether it might be in the nature of prejudice against Mr. Gagnon. I don't know whether—

THE COURT: Well, I can't imagine you as an attorney having your defendant sit there and draw pictures of the jury. In my wildest, I can't imagine that.

Do you know which juror it was?

MR. SHOLDER: Yes, ma'am.

MR. WOLKIN: Your Honor, I—

THE COURT: I will talk to the juror in my chambers, and make a determination.

We'll stand at recess.

(Thereupon, a brief recess was taken; and the following proceedings were held in chambers:)

THE COURT: Let the record show that we are meeting in chambers. Mr. Wolkin is present.

For the record, would you give us your name.

MR. GRAHAM: Garold Graham.

THE COURT: Mr. Graham, the bailiff gave me your note. As you know, Mr. Wolkin is Mr. Gagnon's attorney; the man who was sketching in the courtroom.

MR. GRAHAM: Yes.

THE COURT: Mr. Gagnon is an artist. It was just one of those things that happened. The Court has [190] stopped it. It won't continue.

However, if because of this you feel like you couldn't be—you know—that that would affect you in any way, then I want you to tell us about it.

MR. GRAHAM: As far as any judgment on what's going on, it doesn't affect me. I just thought that perhaps because of the seriousness of the trial, and because of—whichever way the deliberations go, it kind of—it upset me, because—of what could happen afterwards.

THE COURT: Well, do you feel that it upset you to the extent that you couldn't judge Mr. Gagnon fairly—

MR. GRAHAM: No.

THE COURT: —as you would all the others?

MR. GRAHAM: No.

THE COURT: You could be fair to everyone concerned; you're sure of that?

MR. GRAHAM: Yes.

THE COURT: Because if you don't think you could, now is the time to tell us about it.

MR. GRAHAM: I can be fair.

THE COURT: I'm glad you brought it to our attention. I didn't notice it, and counsel didn't—

MR. GRAHAM: I noticed him looking at certain people, and I noticed him looking at me one particular [191] time there; and I didn't know what was going on, until just before the recess. He had pulled his paper up there, and I could see him drawing portraits. And one of the other gentlemen in there had mentioned that he had also seen something of him doing—some sketching, but he didn't know what it was.

THE COURT: Has anybody else mentioned it?

MR. GRAHAM: No.

THE COURT: Does that satisfy you?

MR. WOLKIN: I'm just wondering about the conversation between the juror and the bailiff; whether that was said in front of the jury or not.

MR. GRAHAM: No. I talked with the bailiff in the hallway, after everyone had gotten in.

THE COURT: So nobody else heard you say anything about this?

MR. GRAHAM: No.

THE COURT: Well, we have the pictures. It won't continue. And we'll just go head as we are.

If you feel safe, secure—

MR. GRAHAM: Right.

THE COURT: You would feel comfortable in continuing serving as a juror?

MR. GRAHAM: I feel comfortable.

MR. WOLKIN: This wouldn't prejudice you in any [192] way against Mr. Gagnon?

MR. GRAHAM: No.

THE COURT: Because, of course, it was just inadvertence—as an artist, I guess—he just did it.

Okay. Thank you very much. I would ask you not to bring this up with the other jurors, if you would, please.

MR. GRAHAM: Okay.

THE COURT: I mean, don't say anything about the pictures, or about anything else that has transpired here.

MR. GRAHAM: Yes, ma'am.

THE COURT: But I can assure you that the pictures are here, and that there won't be anymore.

MR. GRAHAM: Thank you.

THE COURT: Okay. Is that agreeable with you?

MR. WOLKIN: Yes.

THE COURT: Very well.

(Thereupon, a brief recess was taken; court and counsel reconvened in the courtroom; the jury being present, the proceedings were resumed as follows:)

THE COURT: The record may show the jury's present, counsel, defendants.

You may proceed with your direct examination.

DIRECT EXAMINATION (Resumed)

* * * * *

APPENDIX D

1. Rule 43, Fed. R. Crim. P., provides:

> **(a) Presence Required.** The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> **(b) Continued Presence Not Required.** The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,
>
> (1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or
>
> (2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.
>
> **(c) Presence Not Required.** A defendant need not be present in the following situations:
>
> (1) A corporation may appear by counsel for all purposes.
>
> (2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

2. Rule 52, Fed. R. Crim. P., provides:

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

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(2)

NO. 84-690

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1984

UNITED STATES OF AMERICA, Petitioner

vs.

ROBERT PAUL GAGNON, et al., Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PREFACE

The four Respondents, Storms, Valenzuela, Gagnon and Martin, went to trial on March 24, 1982. On April 1, 1982, after 1½ days of deliberations, the jury found them guilty of conspiracy to possess cocaine with intent to distribute and the alleged substantive counts of possession of cocaine with intent to distribute.

At trial the Respondents were represented as follows:

RESPONDENTS	ATTORNEYS
Donald Storms	Michael L. Piccarreta
Glen Edward Martin	Robert Benedict
Paul Gagnon	Robert S. Wolkin
Pedro Valenzuela	Stephen C. Villarreal

On appeal, Glen Edward Martin was represented by L. Anthony Fines.

At trial, and on appeal, the government was represented by Negatu Molla, Assistant United States Attorney. The Solicitor General's office prepared the Petition for Writ of Certiorari in this matter.

QUESTIONS PRESENTED

1. Whether it was a violation of the Respondents' right to be present at every critical stage of their criminal trial, when the trial court held an *in camera* interview with a juror, during the course of the trial, outside the presence of any of the Respondents and all of their attorneys except Respondent Gagnon's, about the fact that a juror had observed that Respondent Gagnon was sketching portraits of the jury members and feared possible retaliation.

2. If this was a violation of the Respondents' rights, whether it was reversible error because of its prejudicial effect, as the discussion was *never* disclosed to the Resondents and the remaining attorneys, the juror was allowed to remain on the panel and the remainder of the jurors were never questioned as to their ability to remain impartial under the circumstances.

TABLE OF AUTHORITIES

AUTHORITIES:

OTHER:

STATEMENT OF THE CASE

The only issue raised in the government's Petition for Writ of Certiorari in this matter is whether the District Court erred in holding a conference with a juror, during the trial, outside the presence, and without notice to, the Respondents, the Respondents' counsel (except counsel for Respondent Gagnon) and the government's counsel.

The government's Statement of the Case (see Petition, Pages 2-9) is incomplete in that it does not disclose the entire record 1/ relating to this issue and misstates one of the facts. 2/

* * *

1/ Because no record was made of the circumstances surrounding the private in camera interrogation of one juror by the trial court, the record was supplemented on appeal by the Respondents pursuant to Federal Rules of Appeal Procedure, Rule 10(c) by an affidavit of Robert Wolkin, see Appendix A. This supplement have never been contested by the Petitioner and was approved by the court.

The affidavit is therefore part of the record on appeal and is the only portion in the record which relates how the private conference came to exist; nevertheless, the Petitioner did not include nor mention it within its Petition.

2/ On at least three occasions (See, Petition, Pgs. 6, 13 and 14-15) the Petition states that the Respondents and their attorneys had access to transcripts of the conference. This is not accurate. Transcripts were not available until after the trial was completed, a notice of appeal filed, and normal preparation of appellate briefs by the court reporter.

It was the first day of the trial. The jury was empaneled and testimony from some of the government's witnesses had been presented to the jury, and an afternoon recess (see Transcript Vol. 1, Page 177) was taken. Prior to the jury being brought back, the Respondents, their counsel, the counsel for the government and the Court discussed, on the record, several matters, including a motion for a mistrial and some evidentiary issues. (See Transcript Vol. 1, Pages 177-187). Thereafter, the court brought up, almost as an after thought, (see Transcript Vol. 1, Page 187, Lines 9-10) the fact that one of the jurors was concerned that Respondent Gagnon was drawing pictures of the jury members. After a short discussion in the courtroom, outside the presence of the jury, the Court decided she should speak to the juror. The record reflects that the Court interrupted Gagnon's counsel and stated:

> "Court: I will talk to the juror in my chambers and make a determination." (Transcript Vol. 1, Page 189, Lines 11-12)

A recess was then taken. The Court <u>never</u> advised Respondents' counsel when she would speak to the juror. And, in fact, when the

the Court recessed all of the parties, and their counsel, including counsel for the government, retired from the courtroom except for Robert Wolkin who remained in the courtroom.

Thereafter, Wolkin was contacted by the court's bailiff, Joseph Sholder, and was advised that the trial judge required his presence in her chambers. He was not advised as to the nature of the Judge's request and none of the Respondents nor any of the remaining attorneys, including the government's attorney, were advised, or were present when Wolkin was advised the Court was holding a conference at that time. (See Appendix.)

Even though the Court did make a record of the meeting, transcripts were not provided to the Respondents until after the trial was completed and an appeal had been filed. Neither the Respondents, nor the remaining attorneys, were ever asked whether they were "satisfied" that no prejudice would result from the incident. In fact, they were never informed of the juror interrogation, allowed to witness jurors' reactions to the incident, nor to question that juror or any other

...

jurors regarding any adverse effect of Gagnon's pencil drawings. [3]

ARGUMENTS

I. PLENARY REVIEW OF THIS CASE IS UNNECESSARY.

A. The Court of Appeals' ruling in this matter involves the application of settled law to an unusual set of facts.

In determining whether to grant a given petition, this Court has always considered of paramount importance whether the decision of the lower court will have a significant impact on future cases. See, Stern and Gressman, Supreme Court Practice, § 4.11, PP. 284-285 (1978). The concept of importance relates to the importance of the issues "to the public as distinguished from" importance to the particular "parties" involved. Layne & Bowler Corp vs. Western Well Works, 261 U.S. 387 (1923); Rice vs. Sioux City Cemetary, 349 U.S. 70, 79, (1955).

The facts which give rise to this case are not facts which would recur to any signi-

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[3] Gagnon was an artist. He was never advised not to draw prior to the trial court's admonishment. After the admonishment, the trial court conviscated the drawings.

ficant extent; therefore a decision by this court, given the peculiar circumstances of this case, will not have any overriding impact on the system.

The law that the Court of Appeals applied in this matter is well settled; [4/] therefore the Court of Appeals merely analyzed the law and applied it to the particular facts of this case. The majority of the Court of Appeals, upon reviewing the record and listening to counsel's arguments, then concluded that under the facts of this particular case, the communication was not harmless beyond a reasonable doubt and that the Respondents had not waived their right to raise this issue at that point in the proceeding. See, United States vs. Gagnon, 721 F.2d 672 (9th Cir., 1983).

On this case, the record reflects that trial court announced that it would speak with a juror and then immediately recessed for the afternoon break. The Court never advised any counsel or party when it would speak to the juror or that it would selectively invite

* * *

4/ "It is well settled that communications between judge and jury in the absence of and without notice to defendant and his counsel are improper." United States vs. Hood, 593 F.2d 293 (8th Cir., 1979).

only Gagnon's counsel to be present. Upon recessing, the parties and their counsel, except Wolkin, retired from the courtroom. While Wolkin was still in the courtroom, the trial court via a handwritten note delivered to Wolkin by the Bailiff, advised him that his presence was required in chambers. Thereafter, a juror was questioned by he Court and Wolkin, outside of the presence of all of the Respondents and the remaining counsel regarding the juror's concerns of possible retaliation by the Respondents. During the questioning, the juror announced that at least one other member of the jury also saw Gagnon sketching. At no time was the second juror even identified, let alone questioned regarding his ability to be impartial under these circumstances. After the recess, the trial court returned to the courtroom and witness testimony was continued. At no time was the Respondents or the other attorneys apprised of the in camera meeting. [5] nor were any precautionary instructions even

* * *

[5] There is nothing in the record to indicate that any of the Respondents or remaining counsel for either side were ever advised of the contents of the in chambers meeting or the possible problems with the other juror.

given to the jury. These facts are so unusual and unique that it is not likely that they will ever be repeated in future trials. Therefore, they do not, as the Petitioner indicates, lend themselves to far-reaching consequences.

B. There is no conflict between the Court of Appeals' decision in this matter and decisions of this Court and other Courts of Appeals.

All of the circuits agree that because such important rights are involved, the defendant's right to be present at every critical stage of his criminal trial, the right to effective assistance of counsel at trial, and the right to be tried by an impartial jury, [See, Federal Rules of Criminal Procedure, Rule 43(a); Rogers vs. United States, 422 U.S. 35 (1975); United States vs. Taylor, 562 F.2d 1345, 1365 (2nd Cir., 1977), cert den., Salley vs. United States, 432 U.S. 909 (1977), Green vs. United States, 434 U.S. 853 (1977), Ramsey vs. United States, 434 U.S. 853 (1977) and Wesley vs. United States, 434 U.S. 853 (1977)], that private communications with a juror by a judge "create a presumption of prejudice." United States vs. Treatman,, 524 F.2d 320, 323 (8th

Cir., 1975); United States vs. Pfingst, 477 F.2d 177, 198 (2d. Cir., 1973), cert den., 412 U.S. 941 (1973); United States vs. Myers,626 F.2d 365 (4th Cir., 1980). However, each case must be evaluated on its own record to determine whether such a presumption "may be overcome by evidence giving a clear indication of lack of prejudice." Rice vs. United States, 356 F.2d 709, 717 (8th Cir., 1966) (footnote omitted); United States vs. Hood, 593 F.2d 293, 298 (8th Cir., 1979).

As this Court opined in its recent decision, Rushen vs. Spain, No. 82-2083 (Dec. 12, 1983),

> ". . . when an ex parte communication relates to some aspect of the trial, the trial judge generally should disclose the communication to counsel for all parties . . . ." (footnote omitted)

That opinion went on to conclude that such a communication between a trial judge and a juror can be harmless error; however, to make that conclusion the individual facts in each case must be reviewed.

The Court of Appeals' decision in this case is not in conflict with Rushen. It reviewed the record and held that under the circumstances of this particular case, they could not "find the error . . . to be

harmless beyond a reasonable doubt."
United States vs. Gagnon, 721 F.2d 672, 678 (9th Cir., 1983).

The opinion below in no way modifies, expands or conflicts with the current status of this legal question. It merely analyzes the unique facts of this case within the boundaries established by this Court and followed by all of the circuits.

In order to consider a conflict between decisions of Courts of Appeals as a reason for granting a petition, this Court ordinarily requires a square and irreconcilable conflict between the lower courts. See, e.g. Avco Corp. vs. Aero Lodge 735, 390 U.S. 557, 559, (1968); North Eastern National Bank vs. U.S., 387 U.S. 213, 217 (1967). It has been suggested that a conflict in decisions between various circuits should be relied upon as a ground for certiorari only in instances where it is clear that the conflict is evident and that it can be effectively resolved only by the prompt action of this court alone. Mr. Justice Harlan,
Some Aspects of the Judicial Process in the Supreme Court of the United States, 33 Australian L.J. 109 (1959).

...

No such irreconcilable conflict exists here, since the Ninth Circuit applied the law as set forth by this Court and followed by the various circuits.

The government, in its Petition (Page 26-28) attempts to create a conflict between this decision and other opinions. The government cites five cases, [6] wherein it alleges a conflict; however in each of those cases defense counsel was present, and either a record was made or notes taken by counsel so that counsel could discuss the matter with their clients. The present case differs in that only one defense counsel [7] was invited to attend, no one else was even informed of the meeting, and even though a record was made, it was essentially unavailable until transcripts were ordered to prepare the appeal; therefore, realistically, in this

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[6] U.S. vs. Brown, 571 F.2d 980, 987 (6th Cir., 1978); Henderson vs. Lane, 613 F.2d 175, 179 (7th Cir.) cert. den. 446 U.S. 986 (1980); U.S. vs. Washington, 705 F.2d 489, 498 (D.C. Cir., 1983); Nevels vs. Parratt, 596 F.2d 344 (8th Cir., 1979); and U.S. vs. Walls, 577 F.2d 690, 697-699 (9th Cir.) cert. den. 439 U.S. 893 (1978).

[7] Further counsel for the principal Defendant Storms was not invited nor was he present when Gagnon's attorney was invited to the in chambers proceeding.

case, objections could not be made in a more timely fashion.

Next, the government refers to three cases wherein there was an absence during a part of each trial, of both defendants and counsel and the decisions held such absence to be harmless. However, in United States vs. Yonn, 702 F.2d 1341, 1344-1345 (11th Cir., 1983), counsel was informed of the in camera interrogation of individual jurors by the trial judge, they objected and the court proceeded. A transcript of the questioning was made and the reviewing court found:

> "In this instance, the record reveals the commendable caution exercised by the trial judge in questioning each juror . . . . There is no suggestion that the judge's communications with, or his questions to the jurors intimidated them or prejudiced the defendants. Moreover, when the trial resumed, the court instructed the jury to disregard their earlier conversation, and again reminded them of their duty to base the verdict only on the evidence, the arguments and the court's instructions."
> United States vs. Yonn, supra, 702 F.2d at 1345.

Yonn differs from the present case because counsel in Yonn was advised of the meeting, a transcript was made, and the court helped to minimize the possibility of prejudice by giving instructions to the jurors both in camera and in the Court, before all

counsel. In the present case, the trial court gave no precautionary instructions, the juror was interviewed regarding only one of the Respondents and the juror's potential prejudice against him, and the interrogation was not complete enough to determine any actual bias against Gagnon or the other Respondents. Further no information was elicited regarding the other juror who had seen Gagnon sketching, nor was the other juror questioned. (Transcript Vol. 1, Page 191, Lines 4-5).

This case also differs from United States vs. Dominquez, 615 F.2d 1093 (1094-1096) (5th Cir., 1980) because Dominquez involved a juror who was excused because his mother became ill. It did not involve any aspect of the case, nor did it relate to the defendant in any way. The Court of Appeals held that it would have been better to have counsel present, but under these facts the Court acted reasonably in dismissing the juror.

In the present matter we have a juror who is fearful of retaliation and at least one other juror who is aware of Gagnon's drawing (and perhaps similarly fearful) but who is never asked about his/her fears or given any precautionary instructions; both jurors

remained on the panel and one of the Respondents was directly involved in the matter causing the possible fear and prejudice.

This decision can also be distinguished from United States vs. Bufalino, 576 F.2d 446, 451 (2d Cir.), cert. den., 439 U.S. 928 (1978), wherein the court was advised that the jurors were quite nervous because a couple of spectators were glaring at them. The trial court discussed the problem with all the attorneys concerned and it was decided that the trial court would interview the jurors in chambers. The Court of Appeals held:

> "Judge Larker's decision to use [this procedure], in response to a request from Sparber's attorney, elicited no objection. Counsel for Jacobs was specifically asked if the voir dire would be acceptable to him, and he voiced no dissent. No timely suggestion was made after all the parties had an opportunity to review the transcripts, that additional questioning with or without counsel present would be desirable." [footnote omitted] . . . given the factors reviewed above, we have no hesitation in rejecting, on waiver grounds, this tardily raised claim." United States vs. Bufalino, supra, 576 F.2d at 451.

The instant case is totally different because counsel never agreed not to be present when the juror interview took place, never had an opportunity to review the record

during the course of the trial, nor to request additional questioning. Moreover, as is more fully explained in the next section, neither the Respondents, nor their counsel, waived their right to be present.

Finally, the government relies extensively on this Court's decision in Rushen vs. Spain, supra; however, Rushen and the present matter are also factually different. Rushen involved a seventeen month trial; there was a post-trial hearing, wherein, the juror involved testified and there was a factual finding that the jury's deliberations were not biased and the defendant was not involved [8]. The matter was before this Court, not on appeal, but on a Writ of Habeas Corpus, wherein the findings of facts by the state's trial and appellate courts deserves a high measure of deference and may be set aside only if it lacks even fair support in

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[8] During the trial a witness referred to an individual, who was a member of the Black Panther party, and serving time for an unrelated murder. One of the jurors knew the victim of that unrelated murder. The alleged murderer never testified; the incident was never mentioned again and it was never insinuated that the defendant was involved in this prior incident. The juror was afraid if the incident was mentioned again, she may lose her composure and cry. The only connection with the defendant was that he was a member of the Black Panther party.

the record. 28 U.S.C.A. § 2254(d). Rushen vs Spain, supra.

In the present case the complaint by the juror directly involved the Respondents, it was not removed from them, there was not a fact-finding hearing, and upon reviewing the record, it can not be established that there was no prejudice beyond a reasonable doubt, which is the standard to be applied. See, Rogers vs. United States, 422 U.S. 35, 38-39 (1975).

II. THE DECISION BY THE NINTH CIRCUIT COURT OF APPEALS IN THIS MATTER WAS CORRECT.

A. A defendant and his counsel in a criminal trial have a right to be present at all critical stages of the trial.

A defendant has a constitutional right [9/] to be present at all stages of his trial when his absence might frustrate the fairness of the proceedings. Faretta vs. California, 422 U.S. 806, 819 n.15 (1975); Illinois vs. Allen, 397 U.S. 337, 338, (1970). In addi-

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9/ "One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the Courtoom at every stage of his trial." Illinois vs. Allen, supra. See, Dutton vs. Allen, 400 U.S. 74 (1970). (Confrontation and cross examination of adverse witnesses is a fundamental right.) See, also, Badger vs. Cardwell, 587 F.2d 968, 970 (9th Cir. 1978).

tion the Federal Rules of Criminal Procedure, Rule 43, guarantees a defendant the right to be present at every stage of trial in federal cases. [10/] Rogers vs. United States, 422 U.S. 35, 38 (1975); Shields vs. United States, 273 U.S. 583, 588-589 (1927); United States vs. Walls, 577 F.2d 690, 698 (9th Cir.), cert. den., 439 U.S. 893 (1978). Rule 43(a) states that a defendant "shall be present . . ., at every stage of the trial . . ." (emphasis added) except in enumerated instances specifically set forth in the rule.

Cases have also established that communications between the judge and jury are a "critical" stage of a defendant's trial and therefore the defendant has a right to be present during such encounters. Rogers vs. United States, 422 U.S. 35, 39 (1975); Shields vs. United States, 273 U.S. 583, 588-589 (1927).

The right to be present is not merely limited to the defendant, but extends to the defendant's counsel as well. See, Rogers vs. United States, 422 U.S. at 38-39; Polizzi

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10/ A voluntary absence from trial, or an absence due to the defendant's disruptive conduct "after being warned by the Court", does not constitute an abridgement of the right. See, Illinois vs. Allen, supra; Federal Rules of Criminal Procedure, Rule 43.

vs. United States, 550 F.2d 1133, 1137 (9th Cir., 1976); Federal Rules Criminal Procedure, Rule 43; See, also, United States vs. Walls, 577 F.2d 690, 698 (9th Cir., 1978).

This rule, even though secure, is not absolute. Polizzi vs. United States, supra, 550 F.2d at 1137 (9th Cir., 1976). For example, a defendant may not complain of proceedings held while he was voluntarily absent,, Federal Rules of Criminal Procedure, Rule 43(b)(1), or the privilege of presence may be lost by the defendant's misconduct in the courtroom, Illinois vs. Allen, 397 U.S. at 343, or, a defendant can intentionally waive his right to be present under some circumstances. United States vs Bufalino, 576 F.2d at 451.

Finally, a defendant's presence is not required where his presence would be useless or the benefit but a shadow. Synder vs. Massachusetts, 291 U.S. 97, 108 (1934).

In the present matter, the Respondents did not voluntarily absent themselves since they were not given the opportunity to make an informed decision regarding whether they wished to attend. Secondly, the record is devoid of any indication of any misconduct on the part of the Respondents requiring the

court to have them removed from any part of the trial. And, finally, as is set forth in more detail in the next section, the Respondents did not waive their right to be present since they were uninformed of the conferences.

B. The Respondents did not waive their right to be present at the in camera interrogation of a juror since they were never notified of the interview.

This Court has stated:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights . . . and that we 'do not presume acquiescence in the loss of fundamental rights . . . .' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson vs. Zerbst, 304 U.S. 458, 464 (1938).

In the present case the record does not establish an "intentional relinquishment or abandonment" of the Respondents' right to be present during the interrogation of the juror in question.

The record reflects that out of the presence of the jury several matters were discussed. (Transcript Vol. 1, Pages 177-187.) The court then, at the close of the other matters said:

"Court: I guess we better bring this up in court. One of the jurors indicated to Mr. Sholder that he was - they were concerned - and I don't know which one - that Mr. Gagnon - excuse the pronunciation - was drawing pictures of the jury." (Transcript Vol. 1, Page 198, Lines 9-13).

A short discussion then followed with the court stating:

"Court: I will talk to the juror in my chambers and make a determination." (Transcript Vol. 1, Page 189, Lines 11-12.)

The afternoon recess was then taken and all of the parties and their lawyers, except for Robert Wolkin, retired outside of the courtroom. The Court at no time ever indicated when she would speak to the juror or that she planned to do so without all counsel and Respondents being present.

The court had to send Mr. Sholder, the bailiff, back into the courtroom to obtain Mr. Wolkin's presence in her chambers, thus it would appear that no one, including Petitioner, understood or heard the Court's final comment prior to the recess. The Court could have just as easily invited all counsel back to participate in the interrogation of the juror and could have and should have invited the Respondents as well. (The hearing

could have been held in a closed courtroom in order to protect the rights of everyone involved.)

After the brief closed hearing was completed the court took a recess. (Transcript Vol. 1, Page 192, Line 18) Then the the jury was later brought back and witness testimony was continued.

The court never gave any additional precautionary instructions or advised the remaining counsel or the Respondents what had transpired during the recess. Neither did the Court ever elicit any consent from all of the parties regarding the procedures followed nor determine whether all of the parties were satisfied or even aware of what had transpired.

Since all of the Respondents and their counsel, except for Gagnon's counsel, were unaware of the hearing they could not have objected or requested a copy of the transcript to review to determine whether they were satisfied. Afterall, if trial counsel were to suspect that matters were being handled, outside of their and their clients' presence, a copy of all of the daily transcripts would have to be promptly provided to counsel to assure fairness and this

could result in far reaching and expensive consequences. It cannot even be suggested under the facts herein that counsel and Respondents made a tactical decision not to attend. They were never given the opportunity to make such a decision, a decision which should have been made by them and not the court.

Even under Taylor vs. United States, 414 U.S. 17 (1973), which the government prefers to use over Johnson vs. Zerbst, supra, no waiver occurred because the record does not support a finding of a voluntary absence of the Respondents from this proceeding.

Further, Gagnon should not be treated separately from the remaining Respondents because his lawyer's presence was invited and his lawyer did participate. There are reasons for a defendant to be present, especially if their presence can assist his lawyer and add insight into whether the juror may not be able to be impartial. Minimally, the choice should be left to the defendant as to whether he wants to be present and not made by the court.

It is unreasonable and unfair to suggest that the Respondents had to object to something that they were not aware of, [A

situation different than in Estelle vs. Williams, 425 U.S. 501, 512 (1976) wherein this court held the trial court did not have to ask the defendant whether he wished to be tried in civilian clothes rather than prison garb. It was obvious to all that he was wearing the prision garb], in order to preserve the record.

Furthermore "plain" errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court." Federal Rules of Criminal Procedure, Rule 52(b). Thus, the record does not support the government's contentions that the Respondents waived their right to be present and, since there was no objection on the record to the court proceeding in the Respondents' absence, that they should be precluded from raising the issue on appeal.

C. It was not harmless error to hold such a hearing in the Respondent's absence.

Once it has been determined that a defendant's constitutional right to be present has been violated, his conviction must be reversed unless the government can establish beyond a reasonable doubt, that no prejudice to the defendant resulted. United

States vs. Benavides, 549 F.2d 392, 393 (5th Cir., 1977). United States vs. Myers, 626 F.2d 365, 366 (4th Cir., 1980). If the Appellate Court is unable to determine with certainty, from the record that the lack of presence was harmless, the conviction must be reversed. United States vs. Dellinger, 472 F.2d 340, 380 (7th Cir., 1972); United States vs. Arriagada, 451 F.2d 487, 488 (4th Cir., 1971); United States vs. Click, 463 F.2d 491 (2nd Cir., 1972).

At the in-chambers meeting, the juror, Mr. Graham, indicated that he was fearful of retaliation if a verdict of guilty was returned. (Transcript, Vol. 1, Page 190). He further indicates that he thought that Gagnon's drawings would be used to identify him for retribution purposes after the trial was over. Mr. Graham was suggesting to the court that he had become fearful and possibly prejudiced against the defendants. [11/] The Sixth Amendment right to a trial by jury guarantees to a defendant a fair trial by a

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11/ Only Gagnon was drawing pictures of the jury; however, since the Respondents were all charged with conspiring with each other, the juror may very well have believed that the pictures would be used jointly by all the codefendants in exacting revenge on a jury that convicted them.

panel of impartial, indifferent jurors. Irvin vs. Dowd, 366 U.S. 717, 722 (1961); United States vs. Eubanks, 591 F.2d 513, 516 (9th Cir. 1979); United States vs. Bear Runner, 502 F.2d 908 (8th Cir. 1974). This constitutional right is violated if even one juror is unduly biased or improperly influenced. Eubanks, supra at 517. United States vs. Hendrix, 549 F.2d 1225, 1227 (9th Cir. 1977).

When a juror indicated to the court that he may be unfairly biased against the defendant, the court has a duty to make particular inquiry to determine if actual prejudice exists. United States vs. Corey, 625 F.2d 704, 707 (5th Cir. 1980); United States vs. Nell, 526 F.2d 1223, 1229-30 (5th Cir. 1976); see, Silberthorne vs. United States, 400 F.2d 627, 638-39 (9th Cir. 1968); United States vs. Bear Runner, supra at 912-913, United States vs. Dellinger, supra at 366-67. This duty will not be satisfied by merely asking the juror whether despite the potential for prejudice, he can be fair to both sides. United States vs. Nell, supra at 1230; Silberthorne vs. United States, supra at 638.

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For instance, in Nell, the defendant was charged with embezzling union funds. A perspective juror and the defendant were members of rival unions. Previously, a 500-man riot had occurred during a jurisdictional dispute between the unions. The venireman was also acquainted with the defendant. The court refused to ask any questions which went beyond the venireman's association with the defendant. On various occasions, the venireman stated that he could be fair to the defendant. The defendant was eventually convicted. The Court of Appeals reversed reasoning that the court's general questions as to whether the venireman could be fair did not adequately explore the venireman's potential bias. Id. at 1230.

Similarly, in Silberthorne, supra, the defendant's case was highly publicized. Many of the veniremen had some knowledge of the case. The court, on voir dire, refused to inquire into the particulars of each venireman's knowledge. Rather, the court merely asked whether each venireman could be fair in spite of what he had learned from the pretrial publicity. This court found these questions inadequate and reversed Silberthorne's conviction. This Court of

Appeals reasoned that the questions were faulty on two grounds:

> "(1) The questions propounded by the court to the prospective jurors were calculated to evoke responses which were subjective in nature - the jurors were called upon to assess their own impartiality for the court's benefits, and (2) The entire voir dire examination was too general to adequately probe the prejudice issue. Id. at 638"

The court reasoned further that "merely going through the form of obtaining juror's assurances of impartialty is insufficient to test that impartiality. Id."

Applying these principles to the instant case, the court's questions to Mr. Graham were not sufficient to elicit any actual bias on his part. Like the judge on voir dire in United States vs. Nell, supra, this judge was satisfied with Mr. Graham's bald assertion that he could be fair despite a clear indication by the jury that a potential for bias existed. Further inquiry may have revealed that Mr. Graham was now highly suspicious of Gagnon and his alleged partners in crime. The fact that Mr. Wolkin chose not to probe into Mr. Graham's statement does not mean that the other Respondents' attorneys would not have

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chosen to probe more deeply. [12] Finally, other counsel probably would have inquired as to the name of the other juror who had seen the sketching to determine if he/she too, harbored some bias or fear against the Respondents and to request to examine him/her. Further, no precautionary instructions were requested in an attempt to prevent any prejudice.

Under these circumstances, the government can not sustain its burden of proving, beyond a reasonable doubt, that there was no reasonable possibility of prejudice arising from the fact that the Respondents were not present in chambers. United States vs. Arriagada, United States vs. Benavides, United States vs. Dellinger, and Nevels vs. Parratt, supra.

The Petitioner in its Petition has attempted to meet its burden by arguing that since the trial court and Mr. Wolkin never considered it "necessary or desirable" to question the second juror that it therefore

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[12] The fact that the Respondents cannot now conclusively establish that Mr. Graham was prejudiced is not dispositive. The error here is that the questions put to Mr. Graham were not sufficient to uncover an obvious potential prejudice. See, United States vs. Dellinger, supra at 367.

was of "little importance." (See Petition, Page 14.) That is exactly the point, the interests of the Respondents were not protected at all during this private conference. This second juror should have been questioned and a determination made regarding his/her impartiality.

The government goes on to suggest ". . . that the only purpose of the juror interview was to investigate possible bias against Respondent Gagnon." (Page 15.) However, all of the Respondents were on trial together and charged with conspiracy. Evidence was continually admitted regarding one defendant yet implicating another. Rule 801(d)(2)(E), Federal Rules of Evidence. The questions propounded by the trial court and Mr. Wolkin were insufficient to protect even Gagnon's interests, let alone the remaining Respondents.

It should also be noted when discussing the possibility of prejudice or fear to the Respondents, that this was a closely contested case with lengthy jury deliberations.

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CONCLUSION

The government's Petition for a Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 27th day of December, 1984.

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No. 84-690 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT PAUL GAGNON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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1. Respondents attempt to create the impression that, with the exception of respondent Gagnon, they had no "notice" of the conference between trial court, Gagnon's counsel, and the juror (Br. in Opp. 1, 18); that they were "unaware" of the conference (*id.* at 20); and that they were never "apprised" or "informed" of the conference (*id.* at 6 & n.5, 10). This interpretation of the events is simply incredible.

As the transcript shows (Pet. App. 18a-22a), the episode began when the trial judge informed all of the respondents and their counsel in open court, in the absence of the jury, that one of the jurors had noticed respondent Gagnon making sketches of the jurors. Respondent Gagnon's attorney, Robert Wolkin, requested the court (*id.* at 19a) to "direct some questions to that juror and find out whether the concern that is being expressed, whether it might be in the nature of prejudice against Mr. Gagnon." None of the

attorneys for the other respondents expressed any concern about the incident; the only question raised was about possible "prejudice against Mr. Gagnon."[1]

The trial judge immediately agreed with Wolkin's proposal and stated (Pet. App. 19a): "I will talk to the juror in my chambers, and make a determination. We'll stand at recess." The transcript then notes (*ibid.*): "(Thereupon, a brief recess was taken; and the following proceedings were held in chambers)." What additional notice could respondents have needed? Respondents lamely assert (Br. in Opp. 19) that "it would appear that no one * * * understood or heard the Court's final comment prior to the recess." Far more likely than that four trained lawyers and their clients all failed to hear or understand the court's clear announcement, however, is that respondents knew about, and voluntarily chose not to attend, the conference.

But even if respondents (other than Gagnon) were in fact unaware of precisely when the trial court's conference with the juror would take place, they could hardly have been unaware that the trial in fact resumed, with no change in the jury panel, following the "brief recess." That fact should have suggested to any reasonably diligent attorney that the matter of the juror's fitness to continue serving had been resolved. Moreover, respondents' reconstruction of the facts depends upon the assumption that Gagnon's attorney, Wolkin, did not communicate with his fellow defense counsel. However, throughout the trial, the defense attorneys

[1]The silence of the other respondents at this juncture underscores the weakness of their position that they were entitled to raise the issue of their absence from the conference on appeal under the "plain error" rule. Had Gagnon's attorney not requested that something further be done, there would have been no conference. Respondents plainly could not have raised the issue of juror bias on appeal without lodging a timely objection. They were no worse off by virtue of Wolkin's diligence, and should not be heard to complain of inadequacies in a proceeding which they did not request and in which they evinced no interest.

worked closely together; the objections of one attorney were treated for purposes of the trial as the objections of all defendants.[2] It is highly unlikely, to say the least, that the other respondents failed to learn of the conference from any of these sources.

This disposes, as well, of respondents' contention (Br. in Opp. 20) that "[s]ince all of the Respondents and their counsel, except for Gagnon's counsel, were unaware of the hearing they could not have objected or requested a copy of the transcript to review to determine whether they were satisfied." See also *id.* at 1 & n.2. Since respondents were informed in open court that the trial judge would (at respondent Gagnon's request) conduct the conference, and since they could not, in any event, have remained unaware of the conference under the circumstances, they had no justification for not raising an objection, if they had an objection, or for not requesting to see the transcript, if they deemed it worthwhile to do so.[3]

[2]In light of this practice, it is fair to say that Wolkin represented all of the respondents at the conference. Since he was the attorney (and his the client) most affected by the sketching incident, it was reasonable for the other respondents to rely upon him to represent the interests of all, and for the court to assume that this was the case. See Pet. 15.

[3]Respondents charge (Br. in Opp. 1) that our petition "misstates one of the facts" — namely, that transcripts of the in-chambers conference were available to respondents and their counsel during trial. However, as our petition indicates (at page 6), the authority for this statement is no less than the court of appeals' own statement of the facts of the case. See Pet. App. 5a. And respondents impliedly acknowledge (Br. in Opp. 20) that, if they knew of the conference — as they did — they were able to obtain a transcript. If they did not actually receive a copy of the transcript, it is solely because they chose not to request one, not because one was not available.

Respondents also claim (Br. in Opp. 1) that our statement of the case was "incomplete" because it did not refer to an affidavit by attorney Wolkin that was placed in the record by respondents. However, the affidavit contained no relevant information beyond that recited in the court of appeals' opinion; we therefore relied on the latter source.

2. Respondents' purported distinctions (Br. in Opp. 10-14) of the conflicting court of appeals decisions cited in our petition depend entirely on this attempted recasting of the facts.[4] Since the opinion does not depend at all on the "facts" hypothesized by respondents, the legal principles for which it stands remain in irreconcilable conflict with those applied elsewhere. And far from applying "well settled" principles of law, as respondents suggest (Br. in Opp. 5), the decision of the Ninth Circuit is a radical and unsettling departure from sound practice.

We draw the Court's attention to additional recent authority supporting our position that neither the Constitution nor Rule 43 requires the presence of the defendant at every conference in connection with the trial. *United States* v. *Pepe*, 747 F.2d 632 (11th Cir. 1984) (defendant's presence not required at *James* hearing on admissibility of co-conspirator's statements). *Pepe* also conflicts with the decision below on the question of prejudice, holding that the defendant was not prejudiced by his personal absence from the hearing since his attorney was present and conferred with him, transcripts were available, and the defendant did not suggest any additional questions that should have been posed.

3. None of respondents' arguments thus far discussed applies in any way to respondent Gagnon. Gagnon, through his counsel, unquestionably had notice of the conference; he was represented therein by his attorney, who expressly

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[4]An additional factor relied on by respondents to distinguish *United States* v. *Yonn*, 702 F.2d 1341 (11th Cir. 1983), was that no precautionary instructions were given to the jurors in this case (Br. in Opp. 11-12). However, the court certainly impressed upon the one juror directly involved the importance of impartiality (Pet. App. 20a-22a), and, with the concurrence of Gagnon's counsel, it was decided that the other jurors should not be informed of the incident (*id.* at 21a).

concurred with the results of the conference. The only argument addressed to Gagnon's case is found at Br. in Opp. 21:

> Further, Gagnon should not be treated separately from the remaining Respondents because his lawyer's presence was invited and his lawyer did participate. There are reasons for a defendant to be present, especially if their presence can assist his lawyer and add insight into whether the juror might not be able to be impartial. Minimally, the choice should be left to the defendant as to whether he wants to be present and not made by the court.

However, as our petition explains in detail (at 13-15), Gagnon's presence at the conference with the juror would have been useless or worse than useless. The very point of the conference was to determine whether the juror was intimidated by or biased against Gagnon. It is quite unlikely that the juror's candor during the in-chambers questioning would have been enhanced by Gagnon's personal presence. Our petition also demonstrates (at 18-20) that Gagnon's absence was, and should be considered to be, a voluntary, tactical decision made on, or with the availability of, advice of counsel. Gagnon knew about the conference, but did not attend (for excellent reasons). This would be considered a sufficient waiver in most of the courts of appeals. See Pet. 21-22.

But even if Gagnon's absence were deemed involuntary, the question for the court of appeals was whether he was prejudiced by his absence. Nothing in respondents' brief casts any doubt on our contention that he was not prejudiced in any way.

For these reasons and those stated in our petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

JANUARY 1985

DOJ-1985-01

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* ROBERT PAUL GAGNON ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–690. Decided March 18, 1985

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Last Term this Court divided sharply in a case involving an *ex parte* contact between a judge and juror during a criminal trial. *Rushen* v. *Spain*, 464 U. S. 114, (1983) *(per curiam)*. Five separate opinions issued. Two Justices urged the Court to decide the "important constitutional questions" raised by such *ex parte* juror contacts, see *id.*, at 131 (MARSHALL, J., dissenting); *id.*, at 123 (STEVENS, J., concurring), but diverged significantly in their analyses and conclusions. Compare *id.*, at 140 (MARSHALL, J., dissenting) (*ex parte* contacts implicate three constitutional rights: "the right to counsel, . . . the 'right to be present,' . . . [and] the right to an impartial jury") with *id.*, at 125 (STEVENS, J., concurring) ("the mere occurence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right"). JUSTICE BLACKMUN and I dissented, arguing that the case should be either given plenary consideration, *id.*, at 122 (BRENNAN, J., dissenting), or not reviewed at all, *id.*, at 150–153 (BLACKMUN, J., dissenting).

In the face of this controversy, the bare *per curiam* majority explicitly declined to consider "[w]hether the error [of *ex parte* contact] was of constitutional dimension," *id.*, at 117–118, n. 2, and held only that any error demonstrated on the particular facts at issue was harmless. *Id.*, at 121.

Today, without so much as a nod to this recent reservation of the question, the Court decides that the odd facts of this case do not constitute "the sort of event which every defend-

ant ha[s] a right personally to attend under the Fifth Amendment," citing the lone member of the Court who would have so decided last term. *Ante*, at 4--5. No guiding standard for future application is provided; the Court simply invokes its power to decide *this* case. Such ad hoc resolutions invariably engender more problems than solutions for lower courts.

Moreover, the parties directly affected by today's decision have not even been permitted an opportunity to brief and argue the merits. Given the highly fact-specific nature of the case, my preference would be to deny the petition for certiorari. But if the merits are to be addressed, I would do so only upon full consideration after briefing and oral argument. Accordingly, I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* ROBERT PAUL GAGNON ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-690. Decided March 18, 1985

PER CURIAM.

The four respondents were indicted on various counts and tried together in federal district court for participation in a large-scale cocaine distribution conspiracy. During the afternoon recess on the first day of trial the district judge was discussing matters of law in open court with the respondents, their respective counsel, and the assistant U. S. Attorney, outside the presence of the jury. The bailiff entered the courtroom and informed the judge that one of the jurors, Garold Graham, had expressed concern because he had noticed respondent Gagnon sketching portraits of the jury. Gagnon's attorney admitted that Gagnon had been sketching jury members during the trial. The district judge ordered that the practice cease immediately. Gagnon's lawyer suggested that the judge question the juror to ascertain whether the sketching had prejudiced the juror against Gagnon. The judge then stated, still in open court in the presence of each respondent and his counsel, "I will talk to the juror in my chambers and make a determination. We'll stand at recess." No objections were made by any respondent and no respondent requested to be present at the discussion in chambers.

The district judge then went into the chambers and called for juror Graham. The judge also requested the bailiff to bring Gagnon's counsel to chambers. There the judge, in the company of Gagnon's counsel, discussed the sketching with the juror. The juror stated:

> ". . . . I just thought that perhaps because of the seriousness of the trial, and because of—whichever way the de-

liberations go, it kind of—it upset me, because—of what could happen afterwards."

The judge then explained that Gagnon was an artist, meant no harm, and the sketchings had been confiscated. The juror was assured that Gagnon would sketch no more. Graham stated that another juror had seen the sketching and made a comment to him about it but no one else seemed to have noticed, and no other jurors had discussed the matter. The judge then elicited from Graham his willingness to continue as an impartial juror. Gagnon's counsel asked two questions of the juror and then stated that he was satisfied. The *in camera* meeting broke up, and the trial resumed. A transcript of the *in camera* proceeding was available to all of the parties; at no time did any respondent mention or object to the *in camera* interview of the juror. No motions were made to disqualify Graham or the other juror who witnessed the sketching, nor did any respondent request that cautionary instructions be given to the jury. After the jury returned guilty verdicts no post-trial motions concerning the incident were filed with the District Court.

On the consolidated appeal, however, each respondent claimed that the District Court's discussion with the juror in chambers violated respondents' Sixth Amendment rights to an impartial jury and their rights under Federal Rule of Criminal Procedure 43[1] to be present at all stages of the trial.

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[1] Rule 43 provides:

"(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

"(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,

"(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or

A divided panel of the Ninth Circuit Court of Appeals reversed the convictions of all respondents, holding that the *in camera* discussion with the juror violated respondents' rights under Rule 43 and the Due Process Clause of the Fifth Amendment. *United States* v. *Gagnon*, 721 F. 2d 672 (CA9 1983).

The Court of Appeals held that all four respondents had due process and Rule 43 rights to be personally present at the *in camera* discussion, and these rights were substantial enough to be noticed as plain error on appeal under Federal Rule of Criminal Procedure 52(b), notwithstanding respondents' failure to preserve the issue by raising it in the District Court. Although the juror was only worried about Gagnon's conduct, the Court of Appeals held that the juror's potential prejudice against Gagnon might harm all respondents because they were joint actors charged and tried together for conspiracy.

The court stated that it could find nothing in the record to "conclusively determine" that respondents waived their Rule 43 rights. The Court of Appeals found "no indication of whether Gagnon or the other defendants expressly or impliedly implicated their willingness to be absent from the conference." 721 F. 2d, at 677. That no objection was made to holding the conference without respondents was, to the court, irrelevant on the question of voluntary absence under Rule 43. Because the court found no waiver of the Rule 43

"(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

"(c) Presence Not Required. A defendant need not be present in the following situations:

"(1) A corporation may appear by counsel for all purposes.

"(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

"(3) At a conference or argument upon a question of law.

"(4) At a reduction of sentence under Rule 35."

right to be present, it stated that *a fortiori* it could not conclude that respondents had made an intentional and knowing relinquishment of their due process right to be present. *Ibid.*, citing *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). Finally, the court held that the harmless error rule did not excuse the errors committed by the district court.

We think it clear that respondents' rights under the Fifth Amendment Due Process Clause were not violated by the *in camera* discussion with the juror. "[T]he mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication." *Rushen* v. *Spain*, 464 U. S. 114, 125–126 (1983) (STEVENS, J., concurring in judgment).

The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, *e. g.*, *Illinois* v. *Allen*, 397 U. S. 337 (1970), but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him. In *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934) the Court explained that a defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Id.*, at 105–106, 108; see also *Faretta* v. *California*, 422 U. S. 806, 819, n. 15 (1975). The Court also cautioned in *Snyder* that the exclusion of a defendant from a trial proceeding should be considered in light of the whole record. 291 U. S., at 115.

In this case the presence of the four respondents and their four trial counsel at the *in camera* discussion was not re-

quired to ensure fundamental fairness or a "reasonably substantial . . . opportunity to defend against the charge." See *Snyder*, *supra*. The encounter between the judge, the juror, and Gagnon's lawyer was a short interlude in a complex trial; the conference was not the sort of event which every defendant had a right personally to attend under the Fifth Amendment. Respondents could have done nothing had they been at the conference, nor would they have gained anything by attending. *Id.*, at 108. Indeed, the presence of Gagnon and the other defendants, their four counsel, and the prosecutor could have been counterproductive. Juror Graham had quietly expressed some concern about the purposes of Gagnon's sketching, and the district judge sought to explain the situation to the juror. The Fifth Amendment does not require that all the parties be present when the judge inquires into such a minor occurrence.

The Court of Appeals also held that the conference with the juror was a "stage of the trial" at which Gagnon's presence was guaranteed by Federal Rule of Criminal Procedure 43. We assume for the purposes of this opinion that the Court of Appeals was correct in this regard. We hold, however, that the court erred in concluding that respondents had not waived their rights under Rule 43 to be present at the conference with the juror.

The Court of Appeals found the record insufficient to show a valid waiver of respondents' rights under Rule 43 because there was no proof that respondents expressly or impliedly indicated their willingness to be absent from the conference. The record shows, however, that the district judge, in open court, announced her intention to speak with the juror in chambers, and then called a recess. The *in camera* discussion took place during the recess and trial resumed shortly thereafter with no change in the jury. Respondents neither then nor later in the course of the trial asserted any Rule 43 rights they may have had to attend this conference. Re-

spondents did not request to attend the conference at any time. No objections of any sort were lodged, either before or after the conference. Respondents did not even make any post-trial motions, although post-trial hearings may often resolve this sort of claim. See Fed. R. Crim. P. 33; *Rushen*, *supra*, at 119–120, citing *Smith* v. *Phillips*, 455 U. S. 209, 218–219 (1982); *Remmer* v. *United States*, 347 U. S. 227, 230 (1954).

We disagree with the Court of Appeals that failure to object is irrelevant to whether a defendant has voluntarily absented himself under Rule 43 from an *in camera* conference of which he is aware. The district court need not get an express "on the record" waiver from the defendant for every trial conference which a defendant may have a right to attend. As we have noted previously, "[t]here is scarcely a lengthy trial in which one or more jurors does not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial." *Rushen*, *supra*, at 118. A defendant knowing of such a discussion must assert whatever right he may have under Rule 43 to be present.

Our holding today is in accord with our prior cases and is also consistent with the approach taken by many Courts of Appeal.[2] In *Taylor* v. *United States*, 414 U. S. 17 (1973) the defendant did not return to the courthouse after the first morning of trial. The trial continued in his absence, resulting in guilty verdicts. After his later arrest and sentencing the defendant claimed that he was denied a right to be present at trial under Rule 43 because mere voluntary absence was not an effective waiver of that right. We rejected this claim, *id.*, at 19–20, and held that the defendant need not be expressly warned of rights under Rule 43. Nor did we

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[2] *See, e. g., United States* v. *Washington*, 227 U. S. App. D. C. 184, 191–193, 705 F. 2d 489, 496–498 (1983); *United States* v. *Provenzano*, 620 F. 2d 985, 997–998 (CA3), cert. denied, 449 U. S. 899 (1980); *United States* v. *Bufalino*, 576 F. 2d 446, 450–451 (CA2), cert. denied, 439 U. S. 928 (1978); *United States* v. *Brown*, 571 F. 2d 980, 987 (CA6 1978).

require any type of waiver to exist on the record; the defendant's failure to assert his right was an adequate waiver. Similarly, respondents' total failure to assert their rights to attend the conference with the juror sufficed to waive their rights under Rule 43.

This analysis comports both with the language of Rule 43 and with the everyday practicalities of conducting a trial. If a defendant is entitled under Rule 43 to attend certain "stages of the trial" which do not take place in open court, the defendant or his counsel must assert that right at the time; they may not claim it for the first time on appeal from a sentence entered on a jury's verdict of "guilty." Rule 43(b) states that "the defendant shall be considered to have waived his right to be present whenever a defendant, initially present . . . voluntarily absents himself . . . ." See also Advisory Committee Notes on Fed. Rule Crim. Proc. 43, 18 U. S. C. App., p. 646. Respondents knew the district judge was holding a conference with the juror and with Gagnon's attorney, yet neither they nor their attorney made any effort to attend. Timely invocation of a Rule 43 right could at least have apprised the District Court of the claim, and very likely enabled it to accommodate a meritorious claim in whole or in part. Unlike the Court of Appeals, we find nothing in Rule 43 which requires that latter day protests of the District Court's action with respect to a relatively minor incident be sustained, and the case tried anew. We hold that failure by a criminal defendant to invoke his right to be present under Federal Rule of Criminal Procedure 43 at a conference which he knows is taking place between the judge and a juror in chambers constitutes a valid waiver of that right. The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE POWELL took no part in the consideration or decision of this case.